**The Martin-Brower Company *and* Warehouse Employees, Local Union No. 730 of Washington, D.C. a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 5-CA-12694, 5-CA-12736, and 5-CA-12737

August 6, 1982

## DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 10, 1981, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt her recommended Order.[2]

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The Martin-Brower Company, Manassas, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT threaten you with discharge for union activity, give you the impression of surveillance over union activity, solicit you to take grievances to us rather than attempt to obtain redress through organizing a union, or interrogate you regarding union activity in a manner constituting interference, restraint, or coercion.

WE WILL NOT discharge you, demote you, or otherwise discriminate with regard to your hire or tenure of employment or any term or condition of employment, to discourage membership in Warehouse Employees, Local Union No. 730 of Washington, D.C. a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you under the National Labor Relations Act.

WE WILL offer employees Gary William Burrell, Ross Alexander Cummings, William Leo Heskett, Paul Bryant Jolley, Jr., Robert Ivar Lohman, Charles Franklin Payne, Philip Isaac Posey, Kenneth Ray Walton, and (if we have not already done so) Ernest Richard (Buck) Zoretic reinstatement to the jobs of which they were unlawfully deprived or, if

[1] Respondent asserts that the Administrative Law Judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[2] In a footnote marked with an asterisk in the attached Decision, the Administrative Law Judge discussed certain matters not directly relevant to the issues herein and expressed her desire that said footnote be excised from the Decision. Inasmuch as the matters discussed in the footnote in question were not relied on by the Administrative Law Judge or any of the parties herein, and in the absence of exceptions to the suggestion that the footnote be excised, we hereby order that said footnote be physically excised from the Decision of the Administrative Law Judge.

In accordance with his separate opinion in *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977), Member Fanning would issue a prospective bargaining order.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole, with interest, for any loss of pay they may have suffered by reason of the discrimination against them.

WE WILL remove from the personnel folders of Burrell, Cummings, Heskett, Jolley, Lohman, Posey, Walton, and Zoretic, and give to them, the documents which we prepared to justify or memorialize the false reasons we gave for their discharge and Lohman's demotion.

WE WILL, on request, bargain with Warehouse Employees, Local Union No. 730, as the only representative of the employees in the appropriate unit, and embody in a signed agreement any agreement reached. The appropriate unit is:

All warehousemen and forklift operators employed by us at our Manassas, Virginia, location, excluding all office clerical employees, truckdrivers, receiving clerks, shipping clerks, guards, and supervisors as defined in the Act.

THE MARTIN-BROWER COMPANY

## DECISION

### STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge: These consolidated cases were heard before me in Washington, D.C., and in Woodbridge, Virginia, on February 23–26 and March 16–18, 1981, pursuant to charges filed on October 17, 30, and 31, 1980; a complaint issued in Case 5-CA-12694 on December 18, 1980, and amended from time to time thereafter; and a complaint issued in Cases 5-CA-12736 and 5-CA-12737 on January 7, 1981, and amended from time to time thereafter. As so amended, the complaints allege, *inter alia*, that Respondent Martin-Brower Company violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by interrogating employees about activities on behalf of Warehouse Employees, Local Union No. 730 of Washington, D.C., a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), by threatening employees with discharge for union activity, by creating the impression of surveillance over union activity, and by soliciting grievances from employees in order to discourage union activity. As amended, the complaints further allege that Respondent violated Section 8(a)(3) and (1) of the Act by requiring employees to fill out a new form when they picked orders, by demoting employee Robert Ivar Lohman, and by discharging employees Lohman, Ernest Richard Zoretic, Ross Alexander Cummings, Paul Bryant Jolley, Jr., Gary William Burrell, William Leo Heskett, Philip Isaac Posey, Charles Franklin Payne, and Kenneth Ray Walton, to discourage union activity. Respondent admits that it required the new form, demoted Lohman, and discharged all the named employees except Payne; but denies in its answers the independent 8(a)(1) allegations; contends that the form requirement, the demotion, and the conceded discharges were for lawful reasons; and further contends that Payne voluntarily resigned. One of the complaints further alleges that Respondent refused to bargain with the Union, in violation of Section 8(a)(5) of the Act. The record contains no evidence of a bargaining demand. The brief filed by counsel for the General Counsel in effect withdraws the 8(a)(5) allegation, but seeks a bargaining order to remedy the alleged 8(a)(1) and (3) violations.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I hereby make the following:

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a Delaware corporation engaged in the interstate and intrastate distribution of food and paper products for fast-food restaurants from various locations, including the Manassas, Virginia, facility involved herein. In the course and conduct of its Manassas, Virginia, business operations, Respondent annually performs services valued in excess of $50,000 outside Virginia. I find, as Respondent admits, that Respondent is engaged in commerce within the meaning of the Act, and that exercise of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Background; the Union's Majority Status; Alleged Independent 8(a)(1) Violations*

Respondent's Manassas warehouse and distribution center services McDonald's fast-food restaurants. Ordinarily, this facility serves only the mid-Atlantic area. However, between June 2 and September 20, 1980,[1] the union-represented truckdrivers of M & M Trucking Company were on strike. During this period, Respondent took on responsibility for servicing the 115 McDonald's restaurants normally served by M & M.

About September 29, after the M & M strike had ended, an M & M driver came to Respondent's warehouse to pick up some products which were used by the restaurants normally serviced by M & M but not used by the restaurants normally serviced by Respondent. The M & M driver told employee Burrell that the M & M employees' working conditions had materially improved after their union and M & M "had got things together and got it straight." The two discussed the employees' "problems" at Respondent's warehouse, and the M & M

[1] All dates hereafter are 1980, unless otherwise specified.

driver told Burrell how to go about getting a union at Respondent's facility.

Thereafter, while the employees were on their break and the M & M driver was still on the premises, he and Burrell discussed the matter with employees Payne, David Cole, Lewis E. Huffer, Jr., John Shutlock, and others, in the breakroom of the transportation office. During this discussion, Dick Morrison (admittedly a supervisor) walked into the room a couple of times. Cole, who had once been a member of the Union, supplied the Union's telephone number, and the M & M driver used it to telephone the Union from the breakroom upstairs. The driver related some of the alleged problems of Respondent's employees, alleged that some of them were "scared" and gave the Union Burrell's home telephone number.

Later that afternoon, Union Representative Murry telephoned Burrell at his home. Murry said that the first thing to do in order to organize the facility was to obtain the employees' names and telephone numbers in order to send out authorization cards. Burrell obtained such information before work and during his breaks. Among the employees who responded favorably to his prounion observations were Payne and Walton. David Hougham (admittedly a supervisor) testified that on September 29 Payne said that he had made plans to take care of some of the problems and that it concerned a union, and that Hougham replied he did not want to talk about it.

At Burrell's instance, he, Payne, and Walton went on Thursday, October 2, to a nearby motel, the Holiday Inn, and reserved a room for a union meeting to be held on the morning of Saturday, October 4. They rented the room in Respondent's name, so that Respondent's employees would know where to come. As the three were leaving, Warehouse Manager Jeffrey E. Streilein, admittedly a supervisor, pulled his car into the parking lot, and waved at them as he entered the building. All three waved back. The three employees had expected to pay for the room themselves, but, when they arranged to be addressed at the meeting by the union president, he said that he would pay for the room.

Thereafter, Burrell and Payne talked to second-shift employee Joe Lenk, who took care of telling employees on his shift about the meeting, and to third-shift employee Posey, who relayed this information to the employees on his shift. Before work and during breaks, first-shift employees Burrell and Payne told the employees on their shift when the meeting was to be held, and if they wanted to come they would not be fired, "don't worry about it."

The parties stipulated that as of October 6, 36 named employees were in a unit (described in Conclusion of Law 6, *infra*) which is admittedly appropriate for collective-bargaining purposes, and which consists essentially of Respondent's warehousemen. On October 4, 19 of these employees signed union authorization cards whose authenticity and operative effect are conceded by Respondent.[2] Among the employees who signed cards at the October 4 meeting were all of the alleged discriminatees except Walton and Zoretic. Among those who signed union cards on October 4 were eight employees (Altizer, Carlson, Carper, Casey, Cole, Reid, Shutlock, and White) who were still on Respondent's payroll as of the March 1981 hearing. Also on October 4, employee Carl Fisher signed a card.[3]

On October 6, unit employees Huffer (still employed by Respondent as of March 1981) and Mann signed cards. Also, unit employee Williams testified that on October 6 he read, signed, and dated a union card and that as to the printed portions thereon, it looked like another, admittedly authentic authorization card which was received into evidence. He further testified that employee Posey had given the card to him with the representation that it was a union card and had showed him how to fill it out, and that after filling it out Williams returned it to Posey, who put it on his clipboard. Posey testified that on October 6 Williams read and signed his card and gave it back to Posey, that he put it on his clipboard and set it on the inside of his truck, that the clipboard fell out when the truck hit a bump, and that Posey looked for the clipboard but could not find it. Williams' card will be counted. *Hedstrom Company, a subsidiary of Brown Group, Inc.*, 223 NLRB 1409, 1411 (1976), modified and remanded 558 F.2d 1137 (3d Cir. 1977); *Aero Corporation*, 149 NLRB 1283, 1291 (1964), enfd. 363 F.2d 702 (D.C. Cir. 1966), cert. denied 385 U.S. 973 (1966).

Alleged discriminatee Walton signed a union card on October 7, but his job classification of mechanic is excluded from the unit. Alleged discriminatee Zoretic signed a card on October 10, and backdated it October 5, the date when he had expected Burrell to comply with Zoretic's request therefor (see *infra* sec. II,B,1).

The October 4 Holiday Inn union meeting for the warehouse employees was held in the morning. That afternoon, admitted Supervisor Leslie C. Randall, Jr., who was then Respondent's transportation manager, met at the Holiday Inn with six or seven of Respondent's drivers to discuss their grievances and problems. As Randall sat down, the drivers told him that a group of warehouse employees had held a union meeting at the Holiday Inn that morning. Randall asked who had attended, but the drivers refused to tell him. On the following day, October 5, a driver (not in the appropriate unit) told Supervisor Streilein that the driver had been invited to a union meeting which had been held in Manassas, but had declined to attend. Streilein thanked him for the information, which Streilein reported on Monday, October 6, to Edward L. Werner, who was the manager of the Manas-

[2] The cards were headed "Authorization for Representation under the National Labor Relations Act." Above the blanks calling for the employee's signature and other identifying data, the cards stated:

> I, the undersigned employee of Company: Address of Company: authorize Local affiliated with the [Teamsters] to represent me in negotiations for better wages, hours and working conditions.

Each card received in evidence has the Union's local number in the appropriate blank. Although the physical appearance of some of the cards suggests that the employee himself did not fill in the local number, at least when he signed the card, Respondent does not contend as to any card that this space was blank when the card was signed.

[3] My finding as to Fisher's card is based on a comparison between his purported signature and other entries on that card and exemplars of his signature in Respondent's personnel file. See *Justak Brothers and Company, Inc.*, 253 NLRB 1054, 1079-80 (1981).

sas distribution center and Streilein's immediate superior. Also on October 6, Randall told Werner, Randall's immediate superior, that some warehouse employees had held a union meeting on October 4. Werner asked how Randall had found out and how he was involved. Randall said that he had found this out during a meeting with the drivers. Werner asked how he knew about the drivers having a meeting and how he had got involved with the whole situation. Randall replied that the drivers had called him on that Saturday afternoon and asked him to meet with them. Werner asked who had attended the warehousemen's union meeting, and Randall replied that he did not know.

My findings in the preceding paragraph are based on the testimony of Streilein and Randall, who were called as adverse witnesses by the General Counsel. They were the General Counsel's second and third witnessses, respectively, and were sequestered during the other witnesses' testimony. The General Counsel's first witness was Werner, who was called as an adverse witness and who thereafter was present during almost the entire hearing. Werner initially testified for the General Counsel that he had heard nothing about union activity, including rumors, until he received the Union's representation petition on October 20. Then, he testified that, before October 20, the only thing he could recall which might be considered an organizing attempt was Randall's October 4 meeting with the drivers. Thereafter, Supervisors Streilein and Randall testified to the foregoing October 6 reports to Werner about the union meeting, and Warehouse Supervisor David Hougham testified that about October 11, Werner told him about "rumors" of a union meeting. Werner was Respondent's last witness. On cross-examination by the General Counsel, he admitted having heard prior to October 7 about the warehousemen's October 4 union meeting.

About 8 or 9 a.m. on Monday, October 6, employee Burrell told Warehouse Manager Streilein that he could tell Werner that the employees had had a meeting at the Holiday Inn. Streilein said that he knew all about the meeting at the Holiday Inn and about the union cards being signed. Burrell told Streilein to tell Werner that Burrell was going to vote for the Union.[4] As described in detail *infra*, Respondent discharged employees Burrell and Heskett later that day; discharged Cummings, Jolley, and Posey in the afternoon of October 7; and demoted Lohman about 8:30 p.m. that day.

October 7 was also employee Payne's last day of employment (see *infra*, sec. II,B,4,e). At or about 11 p.m., he was called to Werner's office. During this discussion, Werner "kept asking" Payne where he had been that weekend. Eventually, Payne told Werner that the employees had had a union meeting. Werner said that he already knew about "all your meetings," and "if you wanted somebody to talk to why didn't you come to me . . . [I] was back in town Friday." Payne said that he had not known that Werner was back. Werner asked where he had been on Thursday, whether he was renting any rooms. Payne (who on Thursday, October 2, had participated in renting the Holiday Inn room where the meeting was held) untruthfully replied that he did not remember. Werner told him not to worry about it, and asked what he and Burrell had been doing in the transportation office on Tuesday.[5] Payne again said that he did not remember.[6]

Employee Reid did not attend the October 4 union meeting, but he signed a union card that day at Cummings' solicitation. The discharges during the week following the union meeting caused him to go to work every day with what he testimonially described as "a sick feeling in my stomach not knowing whether I would be working for one day or one hour to the next." About October 11, he approached Supervisor Hougham and, in Center Manager Werner's presence, asked whether Reid could expect to keep his job. Reid received no answer. A day or two later, Reid was approached at his work station by Werner, who asked what Reid knew about the union activities. Reid said that he had been "approached by them," but did not know a whole lot about the union activities. Werner asked why Reid had not attended the union meeting. Reid replied that he did not think it was in his best interest. Werner said that Reid was a good worker, that he must be an "angel to be able to keep [his] head straight and work in the surroundings that [he] was in and not get [himself] into trouble," and that Reid "was the most outstanding representative of the human being that [Werner] had run across." Werner asked Reid if he had known about the union meeting. Reid said yes. Werner asked why Reid had not come to Werner and told him about it. Reid said that he did not want to waste his breath. Reid testified that he made this remark because he had received no response from any of several members of management whom he had approached about continuing "problems."[7]

The last alleged discriminatory discharge (Walton) occurred on October 15. On October 25, during an employee meeting where employees were given a new benefits booklet and a printed employee handbook, Werner said that he wanted to try to indoctrinate the new employees who had been hired on to replace certain other employees. Werner said that he wanted to make sure everybody got out to a good sound start, that certain employees had taken it upon themselves to attend meetings that were not held or authorized by him, and that any person taking part in any such meetings would

[4] This finding is based on Burrell's testimony. Streilein testified that he could not recall that Burrell imparted his feeling about the Union.

[5] As previously noted, the transportation office was the scene of the discussion among employees, including Payne, which was observed by Morrison and led to the employees' first contact with the Union. Burrell testified that this discussion took place on September 29, a Monday.

[6] My findings regarding Werner's statements are based on Payne's testimony. I do not credit Werner's denials (see *infra* fn. 87).

[7] My findings as to this Reid-Werner conversation are based on the testimony of Reid, who at the time of the hearing was still in Respondent's employ and was testifying under subpoena. Werner denied having any conversation with Reid on October 6 or 7 concerning attendance at a union meeting, union activities, or coming to Werner with reports of the Union. To the extent this may constitute a denial of Reid's testimony about the conversation, which he placed as having occurred about a week after the October 4 union meeting "give or take a few days" and 1 to 3 days after several third-shift terminations (third-shift employee Jolley was terminated on October 8), for demeanor reasons I credit Reid. See also *infra* at fn. 87.

be dealt with in a similar manner. He then said, "you know what I mean, don't you?"[8]

### B. *The Alleged Discriminatory Demotion and Discharges; Further Alleged Interference, Restraint, and Coercion*

#### 1. The discharge of Zoretic; alleged unlawful interrogation by Supervisor Morrision

Zoretic started working for Respondent on June 17, 1980, at $6 an hour. He was hired as a part-time employee, but the record suggests that he was a full-time employee at the time of his October 1980 discharge. About 3 or 4 weeks after Zoretic's hire in mid-June, leadman Reid (not claimed to be a supervisor) told him that he was "doing good"; that he was fast, was efficient, and got the job done. Between July 7 and August 25, 1980, Zoretic was off the job because of an on-the-job injury. After his return, Zoretic heard "talk" from fellow employee Posey, and perhaps others, which led Zoretic to think that Werner was going to fire him because of this absence. However, effective September 17, 1980, 90 days after his hire and about 3 weeks before his October 7 discharge, he received a 48-cent increase, explained in his personnel folder as "90 days increase per personnel practices," over his $6 starting rate. Moreover, 2 or 3 weeks before Zoretic's discharge, Warehouse Manager Streilein told him that he was "doing great" and that Streilein had "no complaints whatsoever." Zoretic testified without contradiction that when he did picking work, he was one of the fastest pickers.

Zoretic's duties required him to use a pallet jack, which is a miniature forklift. He preferred to use a particular pallet jack, which was also used by other employees. In April 1980, this and other pallet jacks had been repainted by several of Respondent's supervisors, including Hougham on his own time. By about the third week in September 1980, the face of the pallet jack preferred by Zoretic had been marked up by other employees with profanity and "remarks of higher ups."[9] Zoretic asked one of the mechanics to repaint the pallet jack. At that time, all the others were being repaired if necessary and completely repainted; and the mechanic said that when he got around to it, he would repaint all of Zoretic's preferred pallet jack.

About the middle of the last week in September, and after the elapse of 4 or 5 days without any action regarding Zoretic's preferred pallet jack, Zoretic arrived at the warehouse early, but was forbidden to punch in until the regular starting time. He took from the mechanic's cage the only paint which Zoretic could find, a spray can of red paint, and spray-painted part of the pallet jack, which was yellow. Then, he took a Magic Marker, and marked on the red-painted area his initials and the words "2nd shift."[10] The markings which Zoretic put on the pallet jack did not affect the way it ran.

Later that say, Supervisor Hougham asked Zoretic if he knew who had painted the pallet jack. Zoretic said that he had. Hougham did not write him up at that time. A day or two later, on or about after October 2, a notice appeared on the employee bulletin board that employees were not to paint or mark on any equipment in the warehouse. Also posted was a photograph (taken by Hougham with a company-owned camera) of the pallet jack after Zoretic had spray-painted and initialed it. Center Manager Werner testified that after Zoretic defaced the pallet jack, Werner and Streilein decided to give Zoretic a written reprimand therefor and to require him to repaint the pallet jack.

On October 2, Zoretic received a telephone call at home from a caller who said that he worked for Respondent and was known by Zoretic but refused to identify himself. The caller asked how Zoretic felt about a union getting in. Zoretic said that he would listen to both sides, and would favor a union if it could help him with his money problems. The caller said that a union meeting would be held at 9 a.m. on October 4 at the Holiday Inn in Manassas.

When Zoretic went to work that night, he told Supervisor Morrison that Zoretic had received a telephone call asking how he felt about a union. Morrision asked what the caller had said. Zoretic replied that the caller had said there was to be a meeting. Zoretic asked whether his job security would be affected if the Union tried to get in. Morrision said, "No, we have been expecting it and there is nothing we can do about it . . . if you hear anything else, let me know." Morrision also asked Zoretic if he knew "where [the Union] was at"; he untruthfully said no.[11]

Zoretic did not attend the October 4 union meeting. On October 5, he was present in a group of several employees, including Heskett, while they were doing their warehouse paperwork. Using a normal, happy tone of voice, they were discussing how well the union meeting had gone. Supervisor Hougham was in the vicinity. Later, Supervisor Morrison encountered Zoretic and asked if he heard anything else. Zoretic said no.

Also on October 5, Supervisor Hougham gave Zoretic an "Employee Disciplinary Report" filled out and signed by Warehouse Manager Streilein. The document was dated October 2, 1980; described Zoretic's action in painting and initialling the headpiece of the pallet jack; and stated that it was a "warning" and "The next incident of this nature will result in a 3-day suspension." The document further stated that this was Zoretic's first offense. Hougham told Zoretic that this was a warning letter for painting the pallet jack, and "just sign it. There is nothing to really worry about." Hougham said nothing

[8] My findings regarding the content of Werner's speech are based on Reid's testimony. Streilein, Hougham, and Randall were also present at the October 25 meeting, but were not asked about it. For demeanor reasons, I do not credit Werner's uncorroborated denials. See also *infra* at fn. 87.

[9] This finding is based on Zoretic's testimony. For demeanor reasons, I do not accept Hougham's denial. Streilein testified that he did not recall whether that particular pallet jack had marking on it, but that he did not know that particular jack by name and number.

[10] The initials were "B.Z." Zoretic's nickname is "Buck."

[11] My findings as to the Morrision-Zoretic conversation are based on Zoretic's testimony. Although Zoretic's two prehearing statements did not refer to Morrison's inquiry about where the union meeting was to be held, Zoretic appeared to be a wholly honest witness, whereas Morrison's demeanor was unpersuasive and his testimony was as to certain critical matters internally inconsistent. I discredit Morrison's version of the conversation to the extent it is not corroborated by Zoretic.

about discharge, did not indicate in any way that further action would be taken, and did not ask him to speak to anyone else in management. Without raising his voice in any way, Zoretic signed the document.

Employee Burrell was supposed to bring Zoretic a union card for his signature on October 5, but did not do so. That evening, Zoretic telephoned him and arranged for him to bring one down the next day, October 6. By the time Zoretic got to the warehouse on October 6, Burrell had been terminated without having a chance to give Zoretic a card.

Immediately after Zoretic punched out on October 6, Supervisor Hougham said that he had orders that Zoretic had to paint the pallet jack over again. Hougham did not tell Zoretic who had issued these orders; Hougham testimonially attributed them to Streilein, who testimonially attributed them to Hougham. (As previously noted, Werner testified that he and Streilein had decided to impose this requirement.) Zoretic said that he had already received a warning letter, and asked whether he had to repaint the pallet jack too. Hougham said yes. Zoretic asked if this said, "okay, I guess I still have to do it then." He did not raise his voice or use any obscenities. Hougham gave him some yellow paint and a brush, and said that when Zoretic had finished painting the pallet jack he was to tell Hougham about it and could then go home. Zoretic painted almost the entire pallet jack, and put several coats of yellow paint over the red paint to cover it.[12] Immediately after he finished painting it, another employee drove it away. Zoretic then reported to Hougham that the repainting job was finished, and Hougham showed him where to get the brush cleaner. He cleaned his brushes, put everything away, went out the door, and headed for the gates.

At this point, Morrison sent Hougham to call Zoretic back in. When Hougham told Zoretic that Morrison wanted to see him, Zoretic went back into the building and went into the receiving office to see Morrison, who asked whether Zoretic was the one who painted the pallet jack. When Zoretic said yes, Morrison told him that he was terminated. Zoretic said, "what?" Morrison said that he was fired. Morrison said nothing about Zoretic's being insubordinate, and gave him nothing in writing. Zoretic did not raise his voice at Morrison, and used no obscenities; all Zoretic said to Morrison was "what?"[13]

On the following day, October 7, Zoretic approached Werner and asked whether there was any way Zoretic could get his job back. Werner obscenely and emphatically said no, why should he? Zoretic said that he had done his job well. Werner said, "yes, but you destroyed my pallet jack." Zoretic said that all he had done was paint on it. Werner repeated that Zoretic had "ruined" Werner's $4,000 pallet jack. Zoretic said that while working for Respondent he had received only one warning letter, and he had thought three warning letters constituted grounds for dismissal. Werner said that this was no excuse, and Zoretic had set a bad example for everyone in the warehouse. Zoretic said that he had repainted more of the pallet jack than he had painted, and that he had really righted his wrong. Werner said that Zoretic had not righted it, and that all he had done was to cover it up. Werner said nothing about Zoretic's being insubordinate.[14]

On October 9, when Zoretic came in to pick up his paycheck, Streilein asked him to sign a document which stated that Zoretic had been terminated on October 6 for insubordination. When received in evidence as part of Zoretic's personnel folder, this document contained an entry in Streilein's handprinting, "Employee became insubordinate when required to clean the pallet jack he defaced last week"; Streilein testified that on the day after Zoretic's discharge, Streilein had done the "paperwork" on Zoretic's discharge as a "formality" after Morrison told Streilein that Zoretic had been discharged for being insubordinate to Morrison. The document also contains another entry, in printing, which does not resemble Streilein's and was admittedly not inserted by Morrison, "To: David Hougham"; an entry that this was Zoretic's second offense; and Werner's initials with an October 7 date in the space for the center manager's signature. It is unclear from the record which (if any) entries specified in the last two sentences were on the document when Streilein gave it to Zoretic on October 9. Zoretic refused to sign it, stating that he had not been insubordinate, that he had painted and repainted the pallet jack on his own time, and that he had not got "loud mouth" with anyone. Streilein again said that Zoretic had to sign it. Zoretic again refused and asked for his paycheck. Streilein left, came back, said that he could not make Zoretic sign the document, and gave Zoretic his paycheck.

Zoretic did not obtain a union card until October 10. He read the card, signed it, and backdated it October 5, the day on which Burrell was supposed to give Zoretic a card and had not. Then, Zoretic gave the card to Burrell.

Thereafter, the Unemployment Division, Virginia Employment Commission sent Respondent a form stating that Zoretic had filed a claim for unemployment compensation. The form stated, *inter alia*:

> TO EMPLOYER: . . . Unless this form is completed and returned . . . within 5 calendar days . . . benefits may be awarded without considering your reason for this claimant's unemployment. Give complete information regarding the claimant's separation from your employ. A predetermination fact-finding proceeding, which you may attend, will be scheduled in a case where any issue is raised.

This form was filled out on October 22 by Streilein on Respondent's behalf. Streilein checked the "yes" boxes after the inquiries, "Do you wish to attend a predetermi-

[12] This finding is based on Zoretic's testimony. For demeanor reasons, I do not accept Hougham's testimony that Zoretic painted only the red and a portion around "just to blend it in."

[13] My findings as to the Zoretic-Morrison conversation are based on Zoretic's testimony. For reasons stated *infra*, I do not accept Morrison's version.

[14] My findings as to this conversation are based on Zoretic's testimony. For demeanor reasons, I do not accept Werner's denial that he used obscenities and accused Zoretic of ruining the pallet jack. See also *infra* at fn. 87.

nation fact-finding proceeding?" and "7. Do you know of any reason why this claimant should not be entitled to unemployment compensation benefits?" Also, in response to "8. Enter an 'X' in the appropriate block to indicate the reason for claimant's separation from your employ." Streilein checked the "Discharged" box. The form states that a "yes" under item 7 or a "discharged" under item 8 is to be explained in detail under "Remarks." Streilein wrote under "Remarks," "Employee grossly defaced company property, i.e., a pallet jack, by painting on it with red paint & initialling it in black." Streilein testified that the "Remarks" entry had been filled out in connection with item 7, and did not purport to be the reason for Zoretic's discharge. On this form, Streilen did not state that Zoretic had been discharged for insubordination.

The first witness who testified at the hearing was Center Manager Werner, who was called by the General Counsel as an adverse witness. Werner testified at that time that, although he was involved in the decision to issue a written reprimand to Zoretic for defacing the pallet jack, Werner was not involved in the decision to discharge him. Werner further testified that it was his understanding that Zoretic was discharged for insubordination to Hougham. Thereafter, Werner was present during almost the entire hearing. On the second day of the hearing, Hougham, who was not present during Werner's testimony, testified that Zoretic was not insubordinate to him, and that Hougham had never told Morrison that Zoretic was insubordinate to Hougham. Later that same day, Morrision, who was present during Werner's and Hougham's testimony, testified that Morrison discharged Zoretic partly because he had defaced company property and partly because of insubordination to Morrison. Initially, Morrison testified that Zoretic was insubordinate to Morrison when Zoretic was told to repaint the pallet jack, but Morrison then admitted that such instructions proceeded from a supervisor other than Morrision. Thereafter, Morrison testified that he could not remember what Zoretic said to Morrison that was insubordinate, or whether Zoretic was insubordinate to Morrison before or after repainting the pallet jack, or whether Zoretic was insubordinate to Morrison before or during the October 6 interview, to which Morrison admittedly called Zoretic with the intention to terminate him. In view of Morrison's testimony in connection with Zoretic's alleged insubordination; because of the improbability of Morrison's testimony that Zoretic (who had a pregnant wife and unpaid bills) took no issue with Morrison's assertion that he was being let go for painting the pallet jack for being insubordinate; and for demeanor reasons, I credit Zoretic's version of the termination interview.

On the seventh and last day of the hearing, Werner, who was Respondent's last witness, testified on cross-examination that (contrary to his testimony on the first day) nobody (to the best of his knowledge) had ever told him that Zoretic was insubordinate to Hougham, and that Werner understood Zoretic had been insubordinate, not to Hougham, but to Morrison. Werner went to testify that, when he talked to Morrison after hearing him testify, Morrison had told him that Zoretic was insubordinate to Morrison while Zoretic was in the process of repainting the pallet jack and stowing the gear away. Werner's testimony aside, there is no evidence that Zoretic talked to Morrison during this period. Werner further stated that after hearing the testimony, he had concluded that "the supervisor involved was hasty in this assessment of what took place" in connection with Zoretic, and that Respondent intended to offer him reinstatement and to make him whole for loss of pay and medical coverage. Respondent's announced intentions in this respect do not constitute probative evidence regarding whether Zoretic's discharge violated the Act. They are mentioned in this connection because of their possible effect on any affirmative relief to be afforded Zoretic in the instant proceeding.

### 2. The discharge of Cummings and Jolley

#### a. *Respondent's policy regarding the number of written warnings prior to discharge*

As discussed *infra*, Respondent contends that Cummings and Jolley were discharged because they had each received their third written warning. The parties are in dispute regarding what Respondent's policy is with respect to the number of warnings which an employee is allowed to receive before being discharged. Cummings testified that at a meeting of all personnel around early 1979, just before the Manassas facility began operations, the employees were told that they were to be given a 3-day suspension for a fourth reprimand and to be terminated for a fifth reprimand. Cummings testified that management representatives Ballentine (the Manassas facility's first distribution center manager), George Kimberly (warehouse manager at that facility until September 1980), and Tom Carter (a distribution center manager in Chicago) were present at this meeting. All three of these individuals were still in Respondent's employ at the time of the hearing, but none of them was called to testify, and Cummings' testimony as to what was said at this meeting is uncontradicted.[15] The "Employee Disciplinary Report" forms used by Respondent call for an indication as to whether the offense is the first, second, third, or fourth.[16] Werner, who was distribution center manager when Cummings and Jolley were discharged, testified on the first day of the hearing, as an adverse witness for the General Counsel, that the usual policy at the Manassas facility is to discharge an employee upon his receiving a third written warning, but sometimes such an employee is not discharged "depending on the gravity of the situation"; and in management's determination whether to discharge an employee upon his third written warning, "The primary factors are the seriousness of the situation, the tenure of the employee, if he is

[15] There is no evidence that Werner, who denied making such remarks to Cummings, attended the February 1979 meeting. Werner did not start working at the Manassas facility until January 1980.

[16] Werner initially testified (in response to an inquiry about the reason for the fourth-offense indication) that these forms are used in all of Respondent's warehouses, and that different disciplinary standards are in place at all locations. However, he later testified that the forms were "created" by then Warehouse Manager Kimberly. Still later, Werner testified that the centers covered by bargaining agreements were the only ones which do not follow the three-warnings-and-out policy.

a probationary employee or if he has satisfied a probationary period." Warehouse Manager Streilein testified that, although a third offense is supposed to be automatically grounds for termination, this has not always been the case. Werner testified that employee John Harrison, who was hired in June 1980 and discharged in late September 1980, was not discharged until he had committed a fourth offense. In February 1980, Werner signed an employee disciplinary report which stated on its face that it was employee Brian Spitler's third offense. Spitler was retained in Respondent's employ until April 1980, when he received an employee disciplinary report on which two offenses were checked and which stated on its face that this was his fourth offense.[17] A July 1980 disciplinary report in Heskett's personnel folder states on its face that it is the second such report, and goes on to state that if the offense is repeated, Heskett will be faced with a 3-day suspension or stronger disciplinary measures.

Respondent contends that it had a policy of discharge upon receipt of a third written warning. Respondent's brief does not advert to Werner's testimony as a witness for Respondent, after he had heard Cummings and Jolley testify and inconsistent with his initial testimony when called by the General Counsel, that Respondent had a "three-and-out" discipline policy.[18] Nor does Respondent's brief rely on the testimony of former Supervisor Larry F. Klouser, whose resignation Respondent procured after he admitted stealing from Respondent (see *infra* sec. II,B,4,a), that "the third time you're written up, you're terminated." Respondent's brief does rely on the testimony of employee Zoretic that "three warning letters constitutes grounds for dismissal," but this does not constitute a statement that dismissal is automatic, and Zoretic, who worked for Respondent between June and October 1980, based his testimony entirely on what he had been told by an undisclosed number of fellow employees, including leadman Lohman. Further, Respondent points to the testimony of former employee Laymon, who worked for Respondent between July 1979 and September 1980, that when he was hired, "my immediate supervisor and—I'm not certain, but I believe there were documents shown to me that said, you were allowed, to my understanding, two warnings and upon the third infraction you would be dismissed" (cf. *supra* at fn. 17). Respondent failed to produce these alleged documents; and for reasons set forth *infra* sec. II,B,4,a, Laymon had very strong reasons for giving evidence favorable to Respondent. Notwithstanding the testimony relied on by Respondent, I find from the documentary evidence and the credible testimony that Respondent did not follow the policy of automatically discharging employees upon a third written warning, and that whether Respondent decided on such action depended on the circumstances of the case.

b. *Cummings*

Ross Cummings began to work for Respondent in February 1979, when the Manassas facility was opened, at $5.40 an hour. In May 1979, he received a wage increase to $6 attributed to his having completed his probationary period, and in March 1980 he received an increase, designated as an annual wage adjustment for the Manassas facility, to $6.48.

In April 1980, Cummings received a written warning, his first, on the ground that he had put stock in the picking lines in an improper manner. On September 4, 1980, he received a second written warning, this time on the ground that he had left the job without telling anyone and left the "drydock" in a mess. No contention is made that either of these warnings was unlawfully motivated.[19]

Cummings was one of the employees who, in late September 1980, discussed unionization with the M & M driver in the breakroom and caused him to telephone the Union. Cummings attended the October 4 union meeting, signed a card there, and thereafter took a card to employee Reid and induced him to sign it.

Cummings' first tour of duty after the union meeting began at 7 a.m., Monday, October 6. Cummings ordinarily performed receiving work. However, that morning was rather slow, and at 7:30 or 8 o'clock, Cummings switched duties with employee Carl Fisher, who ordinarily performed picking work, in order to obtain a "change of pace" (see *infra*).

About September 28, Fisher had received a 3-day suspension for pulling down all or most of a storage rack—thereby destroying the rack and a lot of product, and endangering himself and others—by lifting with his forklift something which was heavier than the forklift was prepared to cope with. The morning of October 6, Fisher knocked down some boxes of foam materials with his forklift, and was immediately discharged.[20] At some time between 9 and 10:30 a.m., Payne told Cummings to return to receiving work, and he did so.

Streilein testified that Werner walked with him through the warehouse every day. Streilein further testified that, when he became warehouse supervisor in April 1980, he noticed an "insignificant" dent in a leg at the front corner of a 12- or 16-legged storage rack where ice

[17] The first file document reflecting disciplinary action with respect to Spitler is not on the regular "Employee Disciplinary Report" form. However, there is no evidence that Werner knew this when he signed the three regular "Employee Disciplinary Report" forms, which state on their face that the offense was Spitler's second, third, and fourth, respectively. Employee Lowell Laymon's personnel file shows that he was retained after receiving three "Employee Disciplinary Report" forms, but both the May 1980 and the July 1980 forms state on their face that they reflect a first offense, and the August 1980 form states that it reflects a second offense.

[18] Werner testified that he did not "recall directly identifying one, two, three" during his January 1980 introductory meetings with employees.

[19] Both of these warnings were signed by alleged discriminatee Payne, who was a leadman (not claimed to be a supervisory job). Payne, who was called as a witness by the General Counsel, testified on cross-examination that he gave these warnings to Cummings on the instructions of then Warehouse Manager Kimberly, who at the time of the hearing was still in Respondent's employ but did not testify. There is no evidence that Payne had any personal knowledge of the events which led up to these warnings. Under the circumstances, I perceive little merit to Respondent's contention that Cummings is not a believable witness because he denied having engaged in the conduct which these warnings attributed to him.

[20] Fisher signed a card on October 4. The Union's initial charge alleged that his discharge was unlawful, but he is not named in the complaint.

melt was kept; and that, while the rack was in this condition, he did not tell anyone to repair it.[21] Werner's testimony makes no mention of any such dent before October 6, 1980. Streilein testified that at an undisclosed hour that morning he and Werner walked through the warehouse and made a notation that one of the legs on the rack was somewhat bent and should be straightened out. Still according to Streilein, at that time Werner instructed him to have the mechanic move the product from the rack, straighten out the leg while it was still repairable, and then replace the product. Streilein went on to testify that later that morning, he and Werner returned to the area and found that the previously damaged leg had been visibly bent further and there were scratches in the concrete on the floor where the leg had been pushed aside. Werner testified that he walked near the rack on two occasions that morning, both before 9 a.m., and that during one of these tours he and Streilein saw Fisher knock down the foam materials; but he did not corroborate Streilein's testimony regarding the instructions which Werner allegedly gave him on the first occasion, nor even testify that during Werner's first visit he noticed that the rack had already been somewhat damaged and that he was then accompanied by Streilein.

Later that day, Streilein approached Cummings and asked if he had hit the rack in the back of the warehouse or knew who had hit it. Cummings asked, "What rack?" Streilein said that it was the rack with the ice melt. Cummings said that he had not hit the rack but would go back and look at it. Cummings testified that, so far as he could tell, it looked the same as it had been looking for many weeks previously. A little later, about 2:30 p.m., Streilein told Cummings that Werner wanted him to take everything out of the damaged rack and put it into another rack so it could be taken down. That same day, Cummings did so.[22] When he left work that day, Streilein said that he would see Cummings in the morning.

The following day, October 7, Cummings reported to work at 7 a.m., his usual hour. He was the only employee in the warehouse on his shift; all the others had been transferred or fired. He worked until about his scheduled quitting time. Then, Streilein approached him and asked him to unload a truck which had arrived late. Cummings said that he was really tired and would like to go home. Streilein said, "Well, okay, don't worry about it." A few minutes later, as Cummings was cleaning off the dock, Streilein approached him and said that Streilein wanted to see him before he left. Inferring that he was about to be fired, Cummings said, "Now is as good a time as any." The two proceeded to Streilein's office. Streilein threw an "Employee Disciplinary Report Form" at Cummings. The document was a termination notice. A check appeared before the printed entry "Destruction of Company Property." It bore Streilein's and Werner's signatures, both dated October 7. In the space for "Remarks," Streilein had handprinted the following entry, "On 10/6/80 a rack & guard rail in the rear of the warehouse was hit. Since none of the three individuals working in the area admits to this, all will suffer the consequences. As this is your 3rd offence, you are hereby terminated." Then, Streilein leaned back in his chair. Cummings said, "Why? . . . this doesn't make any sense and besides, being that this was the third time I was written up . . . the three letters were minor." Streilein said that he was just doing what he was told, and escorted Cummings outside. Streilein said nothing regarding the offense being Cummings' third.[23] The damaged rack was left empty until it was repaired by the mechanic later in October.

Streilein testified that only three people (Cummings, Shutlock, and Huffer) were working that morning in an area where they could have damaged the rack with their forklifts; that he asked all three whether they had damaged the rack, and all three denied it;[24] and that, accordingly, he decided to serve an "identical writeup" and "deal equal punishment" to all three. Streilein further testified to deciding that, because Cummings had already had two writeups, he should be discharged. Streilein testified that it is not unheard of for racks to get bumped in a day's work; and, as previously noted, testified that some employees are not discharged until the fourth offense; he was not asked why he did not withhold discharge action here.

The record contains a good deal of evidence in connection with Cummings' testimony that Fisher performed receiving work for a while on October 6 and, therefore, could have been responsible for the alleged October 6 damage to the rack. Because there is no evidence that when Cummings was discharged management had any reason to suppose that Fisher had damaged the rack on October 6, the question of whether (as Cummings testified) Fisher performed receiving work that day is relevant solely to Cummings' credibility generally. Contrary to Respondent, I do not agree that Cummings' testimony about Fisher's work is impeached by the absence of Fisher's initials from the receipts dated October 6, or the absence of Cummings' initials from the picking sheets so dated. The initials which appear on such sheets are only the initials of the employee who finished receiving or picking the items listed, and do not include the initials of employees who performed earlier parts of the operation. Moreover, one of the receipts issued that day was completed and initialed by Cummings but was begun by someone else whose handprinting bears a striking resemblance to the handprinting on documents purportedly drawn up by Fisher and in his personnel folder.[25] More

[21] Similarly, Cummings testified that he had noticed a dented leg many weeks before his October 1980 discharge.

[22] My findings in these two sentences are based on Cummings' and Werner's testimony. In view of their testimony that the rack was evacuated that day, October 6, I do not accept Streilein's testimony that it was not evacuated until October 7. Streilein testified that it was he who ordered the product removed from the rack, and that he issued this order because he feared the rack might fall. At this time, the rack contained 4,000 or 5,000 pounds of ice melt

[23] My findings as to this conversation are based on Cummings' testimony, partly corroborated by Streilein. To the extent that their versions differ, for demeanor reasons I credit Cummings.

[24] At the time of the hearing, Shutlock and Huffer were still working for Respondent. They did not testify.

[25] The items listed in this handprinting consist of certain specified kinds of "foam" items. The cartons which Fisher knocked over in the accident which led to his discharge contained unspecified kinds of "foam" items. Werner testified that both pickers and receivers perform the kind of work being performed by Fisher when he had this accident.

significant is the General Counsel's failure to ask alleged discriminatee Payne about Fisher's October 6 job assignment, in view of Cummings' testimony that that morning he told Payne about Cummings' and Fisher's proposed change of duties and that it was Payne who later told Cummings to return to receiving work because Fisher had been discharged. Nonetheless, as to Fisher's job that morning I credit Cummings, whose testimony is not directly contradicted and is not inconsistent with other evidence.

c. *Jolley*

Paul Bryant Jolley, Jr., was hired by Respondent on June 8, 1980, at $6 an hour. He was hired as a part-time employee, but apparently was a full-time employee when discharged in October. On June 24, he received a written reprimand for being 2 hours late on June 22.[26] On August 1, because of picking errors, he received a written warning for defective and improper work and carelessness. This warning slip said that Jolley was "not performing to [Respondent's] standards. His performance is far below that of fellow employees doing the same job. Employee has been told if he is not performing to [Respondent's] standards by next week he will be terminated." Beside the circle around "Offense Number 2" is the word "final." No contention is made that either of these warnings was unlawfully motivated. His personnel file states that effective September 8, 1980, he received a 48-cent "90 day increase per personnel practices" which was approved on September 23.

In late September or early October 1980, employees Payne and Huffer approached Jolley on the drydock after the end of his shift and asked him whether he would be interested in unionizing the facility. Thereafter, Jolley discussed the matter with employees Williams and Posey. Jolley attended the October 4 union meeting, and signed an authorization card there.

Jolley's duties included moving from the staging area, and loading onto Respondent's trailers, cartons which were made of heavy cardboard; were about 8 inches high, 8 inches long, and 12 inches wide; weighed 20 to 30 pounds each; and contained bottles of liquid corrosives which are used to clean drains, grills, and fryers. On the evening of Sunday, October 5, Jolley started to push across the floor three cartons of corrosives with his pallet jack a distance of 60 to 80 feet, a normal distance between the staging area and a trailer.[27] After Jolley had pushed these cartons for 30 to 40 feet, Werner saw him. Werner told Jolley that cartons of corrosives should nver be pushed across the floor, and instructed him to pick the cartons up and take them to the trailer. Jolley said, "yes, sir," and did so. Werner said nothing further at this time. Nor did Jolley have any discussion of the incident with Streilein or Hougham during that shift, which ended at about 4 a.m., on Monday, October 6. Jolley's next shift began at 11 p.m., on Monday, October 6, and ended at 7 a.m., on Tuesday, October 7. During this shift, management made no comments to him about the October 5 corrosive-pushing incident.

About 4 p.m., on Tuesday, October 7, Hougham telephoned Jolley at home and asked him whether, after finishing his next shift, he would use his own truck to deliver a 5-gallon container of syrup to a restaurant in Luray, Virginia, which needed the syrup before its next regular delivery. Jolley said that he would. Jolley's next shift began at 11 p.m., on Tuesday, October 7, and ended at 7 a.m., on Wednesday, October 8. After his shift ended, he drove his own truck about 50 miles from Respondent's Manassas warehouse to make the delivery at or about 9:30 a.m., and then drove to his Midland, Virginia, home, which is about 50 miles from Luray.[28]

When Jolley returned home, his wife, who was pregnant with twins, told him that she had not felt the babies moving since the morning of the previous day. Jolley drove her to her doctor in Warrenton, Virginia, about 12 miles from Midland, who sent her to a hospital in Manassas, about 18 miles from Warrenton, for a sonagram. After taking the sonagram, hospital personnel told the Jolleys that the results were being telephoned to their Warrenton doctor and Mrs. Jolley should go back to him. However, from the manner in which this message was conveyed, Jolley inferred (as it turned out, correctly) that the babies were both dead.

After leaving the Manassas hospital, the Jolleys drove to Respondent's warehouse, where Jolley was scheduled to report to work at 11 p.m., to tell Respondent that Jolley would not be able to come to work that night. Upon entering Werner's office, Jolley said that he would not be reporting to work that evening, and explained why. Werner said, "We might as well get this all over at once . . . we have to terminate you." Werner said, accurately, that Jolley had had two writeups, and further said that he had been abusing company property. Jolley cursed Werner. Werner told Jolley to sign a typewritten termination paper, with a typewritten date of October 7, which bore the signatures of both Streilein and Werner, also dated October 7. The termination slip stated that Jolley was being discharged for using a pallet jack to push three cases of corrosives across the floor on October 5. The slip further stated, "This is wanton abuse of company property and contributes to in-house damage. This is not the first time you have done this. This is gross negligence and cannot be tolerated.[29] You are terminated effective immediately." Jolley said that everyone whom he had ever seen loading the trucks would load the corrosives the same way he had done it on October

[26] Jolley had never before been late. On this occasion, he was late because he had not been notified that the hours of his shift had been changed. Supervisor Klouser, who signed the warning, said that he could understand the misunderstanding, but was writing Jolley up because Klouser had had to fire another employee who had been late the same day (and on a number of other occasions) and who had been "making trouble."

[27] Jolley testified that the floor in the lane he was on that night was a very smooth finished concrete. The warehouse floor had seams and cracks, but there is no specific evidence that these were present on the route Jolley was then using.

[28] Jolley was never paid or reimbursed for gasoline expenses for making this delivery. Nor had he received payment for performing a similar delivery on an earlier occasion.

[29] On this slip, the typed words "power" and "contemplates" were crossed out, and the handprinted words "pallet" and "contributes" were substituted. This handprinting was not done by Streilein, whose handprinting is distinctive and remarkably legible. The record fails to show who made these corrections.

5. Werner failed to withdraw the termination notice. Jolley refused to sign the termination slip, and left the office. That evening, Mrs. Jolley was hospitalized in connection with her dead unborn twins.

My findings as to Jolley's termination interview are based on his testimony. Streilein and Werner both testified that, when Jolley entered the warehouse that afternoon, he initially went to Streilein's office, and that Streilein then escorted him to Werner's office. Streilein did not testify that Jolley gave any explanation for going to Streilein's office. Werner testified that after Jolley's discharge Streilein told him that Jolley had come to Streilein's office to bring an invoice regarding some syrup he had delivered and to say that he was not going to be at work because he had taken his wife to the hospital; but Streilein, far from testifying that this was the reason for Jolley's alleged visit to Streilein's office or that he later so advised Werner, testified that Streilein did not even know Jolley was married.[30] This denial (in effect) by Streilein that Jolley ever mentioned the Jolleys' experiences earlier that day, and Werner's testimony at one point that Jolley said nothing about his wife or children, impress me as being highly improbable. I credit Jolley's version of the discharge interview, and in view of his failure to mention Streilein, conclude that Streilein was not present.

Jolley testified that after starting back across the company parking lot, he turned around, reentered the warehouse, and ran up the stairs to Werner's office; tried to turn the knob, but found that the door was locked; and may have banged it once. Still according to Jolley, he called that Werner had better lock the door, and then returned to Mrs. Jolley in the car. Jolley credibly testified that when returning to Werner's office, Jolley was angry because he felt he had been treated unfairly, and wanted "the upper hand on him . . . I just wanted to see if he was chicken enough to run . . . the whole time I was at the warehouse he went for bad. He acted like he was never scared of anybody." Jolley credibly disavowed any intent to use physical force. After returning home, he telephoned Werner and apologized for Jolley's conduct.

No other witness was asked about Jolley's second visit. Jolley's personnel file, which was offered into evidence by the General Counsel without objection or limitation, contains an entry (in Streilein's handprinting, signed by him, and dated October 7) which states, in part, that after Jolley was informed of his termination, he "became abusive, threatening & loud. He left & then came storming back upstairs, pounding on the door & threatening once again." The same document contains an undated entry, after Streilein's signature but above his initials, "Note: On 2nd encounter, he was screaming obscenities & challenging us to come out of the office. Approx time—16:46 hours." The "Note" goes on to state that Respondent called the county police, who stated that Respondent's only recourse was a misdemeanor charge. Jolley is 6 feet 1 inch tall, weighs 235 pounds, and was then 18 or 19 years old. Werner is an inch taller, weighs about the same, and was 34 years old.

Werner testified that his observations of the October 5 incident where Jolley was pushing corrosives were passed on to Streilein and were reviewed by Streilein and Hougham. Hougham testified that nobody consulted him, just prior to Jolley's discharge, about his work performance, and that before his discharge Werner did not discuss the October 5 corrosive-pushing incident with Hougham. Streilein testified that he asked Hougham (Streilein's subordinate) to "verify" the report of Werner (Streilein's superior) to Streilein that Werner had "stopped" Jolley on October 5 and that Hougham said yes; Hougham denied telling Streilein that Werner had stopped Jolley. Werner testified that he decided to discharge Jolley after "counselling" with Hougham (who, as previously noted, denied such discussions) and at Streilein's recommendation. Streilein testified that Werner instructed him to discipline Jolley for pushing corrosives. Werner testified that he, Streilein, and Hougham "determined that [Jolley] had been verbally warned prior to that that [pushing] was not the proper way to move corrosive material in the warehouse." Streilein testified that it was after Jolley's discharge when Hougham told Streilein that Hougham had given Jolley an oral warning for pushing corrosives. Hougham testified that he reported this alleged incident to Streilein a week before Jolley's discharge; that when Hougham observed Jolley pushing corrosives, Hougham told him not to do that; and that Hougham never again saw him do it. Jolley testified that he usually transported corrosives by pushing, and that before Werner's October 5 reproof, nobody had ever told Jolley not to do so; employee Zoretic testified that nobody had ever told him how to transport corrosives. Werner testified that, before Jolley's discharge, Streilein investigated the incident with Jolley. Streilein testified that he did not talk to Jolley about the October 5 corrosive-pushing incident because Jolley did not work on October 6; Respondent did not produce the timecard of Jolley, who testified that he worked a shift which began at 11 p.m. on October 6 and that after Werner told him on October 5 to stop pushing corrosives, management did not mention the incident to him until his October 8 discharge.

Streilein testified that to his knowledge Jolley was the only employee who ever received any form of written discipline for pushing corrosives. Werner, Streilein, and Hougham all credibly testified that the preferred practice in moving cartons of corrosives is to transport them on pallet jacks (which are available throughout the warehouse) rather than to push such cartons along the floor, because cracks, seams, and debris on the floor create some risk of rupturing the cartons and the plastic bottles inside, and because spillage of corrosives can cause a cleanup and, perhaps, a gas problem. However, such instructions have never been put into writing.

Streilein testified, without being asked for a date, that on three or four occasions he had seen employees Lee Killinger and Hedrick pushing corrosives, and that Streilein had "spoken to" them about the matter but had not written them up. He testified that he had never seen

[30] However, a memorandum by Streilein in Jolley's personnel file (see *infra*) states, *inter alia*, that Jolley "came into office to report off from work."

anyone else push corrosives. Hougham testified, without being asked for a date, that during his 14 months as a supervisor he had seen two other warehousemen (Van Ord and Hendricks) push corrosives, and had brought to their attention that they were not supposed to do that but did not write them up. In final form, the testimony of Laymon, an employee between July 1979 and September 1980, states that the only employees whom he had seen pushing corrosives were Van Ord (discharged for other reasons) and Jolley. Laymon was an unreliable witness with strong reasons for testifying favorably to Respondent (see *infra* sec. II,B,4,a), and certain parts of his testimony indicate that he had in fact observed other employees push corrosives.

When Jolley was being trained in late August as a dry loader, Supervisor Klouser instructed him to push the corrosives over the floor when Jolley was pushed for time.[31] Jolley credibly testified that he had used this technique for transporting corrosives throughout his approximately 6 weeks as a dry loader, during which he had loaded them seven to nine times a day. Jolley testified that he had seen employees Killinger, Richard Beaver, Huffer, another employee whose name he did not know, and Supervisor Klouser push corrosives. Employee Burrell, a warehouse employee for 16 months which included Jolley's tour of duty, testified that, in late 1979, Burrell saw Supervisor Klouser transport corrosives by pushing; and that, thereafter, Burrell himself transported corrosives that way because it was "a little bit faster because you didn't have to get off the jack" and "we were always in a rush around there." Burrell further credibly testified without contradiction that, about April 1980, Werner engaged him in conversation while he was pushing corrosives, but said nothing to him about the matter. Employee Zoretic, a warehouse employee for a 4-month period which included Jolley's tour of duty, testified that he had seen employees push corrosives.

Circumstantial support for the testimony that employees frequently pushed corrosives is provided by evidence regarding the loading system and requirements then in effect. This system compelled the loaders to transport corrosives separately from any other products, encouraged and sometimes compelled the loaders to transport from the staging area single loads which consisted of a few cartons of corrosives, and encouraged and sometimes compelled the loaders to transport corrosives from the staging area just before the trucks were supposed to pull out and when employees were particularly pressed for time.[32] As to employees pushing of corrosives, I credit the testimony of Jolley, Burrell, and Zoretic in the preceding paragraph; I find that the frequency of such conduct was understated by Streilein, Hougham, and Laymon; and I conclude that while Jolley was working for Respondent, corrosives were frequently transported by pushing.

3. The demotion and discharge of Lohman

Robert Ivar Lohman was hired by Respondent in August 1979 at $5.40 an hour. On a date not clear in the record, he received an increase to $6 an hour; inferentially, this was given about November 1979 when he completed his probationary period. In March 1980 he received an increase to $6.48, in connection with the "annual wage adjustments" for the Manassas facility. In June 1980 he was promoted to leadman, not claimed to be a supervisory job, and received an increase to $6.88.

Streilein and Hougham both testified that Lohman was a hard worker. Streilein further testified that Lohman was a very strong worker with a lot of endurance. Werner testified that Kimberly, the warehouse manager between February 1979 and September 1980, complained about Lohman's performance. Werner gave no dates in this connection, and did not testify to any such complaints by Streilein (Kimberly's successor) or Hougham (Lohman's immediate superior). Hougham credibly testified that in early September, when the employees were unusually busy because to their regular duties had been added work ordinarily performed by the M & M strikers, he instructed all the employees, including Lohman, to engage in "continual cleanup" activity. Lohman credibly testified that there had been complaints that empty pallets were not being stacked high enough; that he instructed his crew to stack them 20 high; that after "awhile" the crew got in the habit of doing so; and that he could recall no subsequent complaints about the matter. Also, Lohman credibly testified that his duties included keeping the dock clean; that during this period he tried to develop among his crew a cleanup system for trash; and that "I don't remember anything like a warning." Supervisor Morrison testified that during the M & M strike, Respondent's employees were working so hard that the trash was not swept up as carefully as usual on a day-to-day basis. Before October 6, Lohman received no written warnings, nor is there any evidence that he received any oral warnings.

Among the products regularly stored in the warehouse were 72-towel cases of red-striped cloth towels, similar to bar towels or cheap dish towels, which were used by McDonald employees to wipe off counters. Each towel cost 20 to 30 cents. In late spring 1979, before Lohman began working for Respondent, then Warehouse Manager Kimberly advised a group of employees that he was tired of having employees break into boxes of cloth towels, at least some of which were being used by employees around the warehouse. He said that thereafter he would arrange for an open box of cloth towels to be put from time to time on the supervisors' desk, and that the employees could use them for sweat towels and to clean up spills and other messes. He said nothing about restrictions in connection with taking them home. This practice

[31] This finding is based on Jolley's testimony. For demeanor reasons, I do not accept Klouser's testimony that on one occasion he saw Jolley pushing corrosives and told him that this was not the way to load corrosives.

[32] On an undisclosed date after Jolley's discharge, Respondent discontinued the practice of requiring the pickers to obtain corrosives, like other products, from stock and to place them, along with the rest of the orders, in the staging area. Instead, after transporting the products in the staging area to the loading area and loading them onto the trailers, loaders such as Jolley were required to obtain the corrosives from stock. This procedure change eliminated much of the loaders' incentive to push corrosives.

was in effect when Lohman started working for Respondent in August 1979.

Werner became center manager in January 1980. Upon assuming this position, he gave a speech to all the employees, during which he said that removal of company property would be grounds for immediate dismissal. He did not specifically mention towels.[33] Kimberly continued until April 1980 his prior practice of periodically making open boxes of towels available to the employees.[34] About April 1980, Werner saw two towels on Heskett's power jack, and asked whether he had got them from inventory. Heskett replied that he had got them from an open box of towels which Streilein had put on the supervisor's desk.[35] Werner said nothing further about the matter at this time. Later that day, when Heskett left for the day, he left the towels on his power jack, and he never saw them again.[36] Werner or Streilein removed the open box of towels from the desk, and put it in the "recoup area," where Respondent keeps products which are to be repacked or cleaned up to be made saleable, and equipment used for performing this operation.[37] Thereafter, no more open boxes of towels were made available to the employees. Further, when Supervisor Hougham saw towels in the trash, unless they were "really grungy," he would take them to the recoup area. However, Werner testified that new and used towels were thrown away in the dumpster with some regularity, and that nobody was ever verbally warned or otherwise disciplined therefor. As described *infra* section II,B,4,a,d, nobody asked employee Posey to return a case of greasy towels which he found in the dumpster. On an undisclosed date after the discharges at issue in this case, a lock was installed on the wooden box where towels were kept in the recoup area.

While towels were still being made available to the employees, Lohman removed a total of about seven from the box. Thereafter, he took no more. At all times from his August 1979 hire until October 7, 1980, Lohman carried one of these seven towels on his belt while at work. He used this towel to wipe his forehead, wipe his glasses, and blow his nose.[38] As a towel became soiled he would take it home (sometimes attached to his belt), would launder it, and then would bring it (sometimes attached to his belt) back to the warehouse so he could use it again. Werner testified that he saw Lohman and other employees continue to carry towels after Werner's April 1980 discontinuance of the practice of making new towels available to employees, and discussed with Lohman the "peculiar" fashion in which he had a towel tied to his belt; but never asked him if he was taking the towels home, or what he did with them at the end of the day. Werner further testified that on an undisclosed date or dates in 1980, he saw Lohman leaving the building with a towel on his belt. Supervisor Morrison, who worked at the Manassas facility in September and October 1980, testified that he saw Lohman using one of these cloth towels to wipe off his glasses. Streilein, a warehouse supervisor and then a warehouse manager between April 1980 and Lohman's October 1980 discharge, testified that he saw Lohman "usually always" with a towel tied on his pallet jack, but never asked him where he was getting them or whether he was taking them home and washing them. Klouser, a warehouse supervisor from the fall of 1979 until August 1980 and a transportation supervisor in September and October 1980, testified that in 1980 he saw Lohman, Heskett, and one or two other employees use towels; that Lohman kept a towel hanging on his belt; and that Klouser never wrote up anyone for using cloth towels. Supervisor Hougham testified that in April or May 1980 he told Streilein that Lohman had some cloth towels; that Hougham could not recall any instructions from Streilein (then Hougham's equal) about what to do; and that Hougham thereafter saw Lohman with a towel around his belt. Hougham initially testified that he did not believe he told any of his superiors that he saw Lohman with towels; but Hougham later testified that, in the summer of 1980, he saw Lohman with towels and reported this to Werner.[39]

It is undisputed that before Lohman's October 9 discharge he was never disciplined in connection with towels. Werner testified that on an undisclosed date or dates between January and October 1980 he "challenged" Lohman about the towels; that Lohman replied that someone opened the box and put them out there and he would put the towel back when he was done with it; and that Werner did not issue him a warning of any kind for using the towels. Streilein testified that he never spoke to Lohman about the towel matter. Lohman testified that before October 8, 1980, the day before his discharge, he could not recall that anyone in management talked to him about the use of towels. As to management's statements about towels, I credit the foregoing testimony by Lohman and Streilein, and discredit Werner's and Streilein's testimony otherwise,[40] for demeanor reasons, in view of the undisputed evidence regarding Lohman's continuous use of the towels, and in view of his promotion to leadman in June 1980, after

[33] This finding is based on Werner's testimony. However, Werner's affidavit in connection with the 10(f) proceeding alleges that he specifically said that employees could not use stored cloth towels, or take them home.

[34] This finding is based on employee Heskett's testimony, partly corroborated by Supervisor Streilein. Werner initially testified that to his knowledge there was no time when a case of towels was put on the warehouse supervisor's desk for employees to take as they pleased. However, he thereafter described such incidents in February and April.

[35] Heskett had not seen Streilein do this, but inferred from the location of the box that Streilein had put them there. Streilein testimonially denied that he had done this.

[36] This finding is based on Heskett's testimony. For demeanor reasons, I do not accept Werner's testimony that he took the towels from Heskett and put them back in the box.

[37] Werner's testimony indicates that the towels were used in cleaning up other products, and that towels in a damaged case were not considered salable.

[38] Lohman's duties required him to operate a forklift in Respondent's freezer. When he drove the forklift into the freezer, a mist appeared on his glasses, which are heavy and which he needs in order to drive a forklift safely. Also, the drop in temperature caused his nose to run.

[39] I discuss *infra* Hougham's testimony that before October 7 he never saw Lohman take any towels home.

[40] Streilein elsewhere testified that, after the April 1980 removal of the box of towels from the supervisor's desk, he told the employees on his shift not to take towels, and if he saw a man with a towel, Streilein told him to put it back where it belonged.

Werner discontinued making towels available to employees.

On October 2, while Lohman was performing "power work" at a desk, employee Lenk approached him and asked if he were interested in bringing a union into the Company. Lohman said, "yes, definitely." Lenk then told him about the forthcoming October 4 union meeting at the Holiday Inn. Lohman attended that meeting and signed a card there.

On Monday, October 6, Lohman told Warehouse Supervisor Hougham that Lohman was "definitely interested" in bringing the Union into the Company. Hougham gave him a blank look. A little later, Hougham asked him why he had made that statement about the Union. Lohman replied that he had been advised that he should be open about his interest in the Union.

On the loading dock at or about 8 p.m., on October 6, Werner called Lohman's attention to the fact that Carper, an employee on Lohman's crew, had put a box on a truck in such a way that it would block off the ventilation to cool off the load. Lohman asked whether that had been a persistent problem recently and whether Lohman should call his crew together and draw the matter to their attention. Werner said that he did not think that would be necessary, but Lohman should make sure that the loading was being done properly. Werner did not say that he would write Lohman up or that his job as a leadman was in jeopardy.[41]

Hougham testified that immediately after this incident Werner remarked to him that the improper loading of a truck is not a good example for a leadman to set for the rest of the employees, and questioned whether Lohman should be a leadman. Hougham went on to testify that Werner asked about Lohman's performance as a leadman, to which Hougham replied by referring to the improper loading incident a few minutes earlier and by alleging that the loading dock was continually loaded with paper and trash. Still according to Hougham, he and Werner thereupon argeed that Lohman should be demoted. Hougham testified that Werner initiated the decision to demote Lohman and recommended the demotion to Hougham, who agreed. Werner testified that Lohman's demotion was due to Hougham's recommendation.

About 8:30 p.m. the following day, October 7, Supervisor Morrison told Lohman that Werner wanted to see him, and escorted him to Werner's office. On the last day of the hearing, Werner testified that before this interview nobody had "formally acknowledged" to him that Lohman had taken company property off the premises, and that Werner did not call him in because Werner had knowledge that he had taken company property. However, on the first day of the hearing, Werner testified that he called Lohman in on October 7 to discuss his removal of company property and in connection with the "continuing investigation of theft"; and, on the fifth day of the hearing, Werner testified that on an undisclosed date or dates, he saw Lohman leave the premises with a towel tied to his belt.

Werner began the conversation by asking Lohman what was happening. Lohman said that he did not know, that there had certainly been a lot of turnover recently. Werner laughed sarcastically. Werner told Lohman what the duties of a leadman should be, said that Lohman had been asleep for the past 2 or 3 days, and said, "congratulations . . . you're no longer a leadman." Then, Werner showed Lohman an employee disciplinary report, his first, which stated that because of the October 6 incident where a truck was loaded so as to block the cooling unit he could no longer act as leadman. (As previously noted, Lohman had received a 40-cent increase when promoted to leadman.) The warning notice does not refer to an untidy loading dock. Werner testified that "the supervisor" had completed the disciplinary report which Werner gave Lohman on October 7, but Warehouse Manager Streilein's signature (the only management signature thereon except Werner's, which is dated October 7) is dated October 8.[42] Lohman asked who was going to be the leadman. Werner asked who Lohman thought shoud be leadman. Lohman said that he thought he should be leadman, otherwise he would never have asked for the job. Werner said that Lohman might be interested in a vacancy for supervisor on the midnight shift. Lohman replied that he was not interested, and that it seemed strange that Werner had offered it to him immediately after demoting him from leadman. Werner said that maybe Lohman's light would shine brighter in that field or he would find his true calling there. Lohman said that he was definitely not interested in the supervisory vacancy. Werner said that it was better than no job at all.[43] Lohman said that he was not surprised at this, that all this was happening because there had been a pattern of harassment ever since the union meeting. Werner acted surprised and said, "what meeting?"[44] Lohman

[41] My findings in this paragraph are based on Lohman's testimony. Lohman testified that nobody else was present during his discussion with Werner. Werner testified, in effect, that it was Lohman himself who improperly loaded the trailer, but Werner admitted to not warning Lohman that his leadman job was in jeopardy, and was not asked whether Hougham was present during the Lohman-Werner conversation. Hougham testified that it was Lohman himself who had improperly loaded the trailer and that Hougham and Werner helped him correct the problem at the time. Hougham denied that Lohman offered to call his crew together and instruct them about not blocking the air-conditioning vents when they loaded the truck, but testified that Hougham never warned Lohman that his leadman position was in jeopardy. The warning issued to Lohman after this incident is signed by Werner and Streilein and does not bear Hougham's signature; and does not allege that Lohman himself loaded the truck, but instead suggests that someone else loaded it ("a trailer was loaded . . . on your . . . shift. The frozen was packed around the [cooling unit] . . . You are paid to lead the men on this shift and to insure this doesn't happen"). In view of this warning notice and for demeanor reasons, I credit Lohman. Carper, who was still in Respondent's employ at the time of the hearing, did not testify.

[42] Streilein was not Lohman's immediate supervisor, and there is no evidence that he was present during the October 6 incident described in the warning notice. Moreover, uncontradicted evidence regarding a Werner-Lohman-Streilein conversation just before the October 8 beginning of Lohman's shift shows that Streilein was then unaware of Lohman's October 7 demotion.

[43] My findings regarding the discussion of a supervisory job are based on Lohman's testimony. Morrison, who was still in Respondent's employ at the time of the hearing and was called by the General Counsel as an adverse witness, was not asked about this part of the discussion. In view of this absence of corroboration for Werner's denials, and for demeanor reasons, I do not credit such denials. See also *infra* at fn. 87.

[44] As previously noted, Werner testimonially conceded that he already knew about the October 4 union meeting.

said that if Werner did not know about the meeting it could not be relevant to the proceedings.

During this conversation, Lohman, as usual, had a cloth towel tied to his belt. Werner asked him how many he had at home.[45] Lohman said that he estimated he had five to seven. Werner asked when was the last time Lohman had received some from Heskett. Lohman said he had never received any from Heskett. Lohman said that at one time the towels had been freely available, and he had been openly carrying one, and using the towels continuously ever since. Werner said that the towels were company property, and asked whether he had authorization from anyone from management to use them. He said no. Werner told him to wash and iron them carefully, to fold them, and to bring them all to Werner in his office before starting work the next day. Lohman said that he would.

Werner then asked Lohman what he knew about the stealing that had been taking place. Lohman said that he knew nothing about it. Werner said that Lohman must be very stupid, and that Werner was disappointed in him and had thought he was smarter than that. Lohman asked whether Werner wanted Lohman to make up a lie to please Werner. Werner said no. Lohman said that there was a lot of harassment and the employees were unhappy. Werner said, "Well, the honest employees are all one big happy family, aren't they?" After he asked this question a couple of times, Lohman replied that not all the honest employees were happy. Lohman asked what he was to do now, since he was no longer leadman. Werner obscenely told him to return to his work station.[46]

On the following day, October 8, before punching in, Lohman went up to Werner's office and gave him five towels, washed and folded but not ironed. Lohman said that these were all the towels he had. Werner said "you'll find more." Then, Lohman asked Warehouse Manager Streilein what to do. Streilein, whose signature with an October 8 date appears on the warning and demotion slip shown to Lohman on October 7, said that Lohman should know, since he was leadman. Werner and Lohman told Streilein that Lohman was no longer the leadman. Then, Streilein said that he would be down in a half hour or so. Lohman went downstairs and tried to do what needed to be done.

Lohman worked from 3 p.m. on October 8 to 2:30 a.m. on October 9. Then, Hougham told Lohman to accompany him to the receiving office, where Hougham gave him a termination notice and told him to read it and to acknowledge by his signature that he had read it. As a reason for the termination, this notice bore an "X" before the printed entry "Dishonesty." Under "Remarks," the notice said, ". . . You were observed leaving the premises with company property ([cloth] towels). These were provided for use in the plant and were not to be taken home. This is theft and cannot be accepted. Your termination is effective immediately." Lohman said that it was ridiculous that what he had been openly doing for over a year was now being considered stealing, and asked whether his signature meant that he was endorsing the conclusions of what it said. Hougham said no, Lohman's signature just meant that he had read it. Lohman signed the notice, which bears the typewritten date of October 9. Lohman credibly testified that his signature thereon, which is dated October 9, was signed and dated by him on that date. He was not asked whether Hougham's and Werner's signatures, both dated October 9, were on the document when Lohman signed it. Werner testified that Lohman had been using the returned towels "I'm sure from the time I arrived." Initially, Werner testified that "We assume that he returned all the company property." Then, when asked, "You did assume that he returned it all?" Werner said, "We assume that whatever we asked him to return, he identified as the company property. Whether he in fact did or didn't, I don't think we'll know."

My findings as to the events after Lohman punched in on October 8 are based on his testimony. Respondent did not produce Lohman's timecard for that shift, or any Lohman timecard for any subsequent shift. Hougham testified that on October 7 he saw from an upstairs landing "a cloth towel" in Lohman's back pocket as he was getting into his car, no earlier than 11 p.m., to leave for the day. Hougham went on to testify that on October 8, without consulting Werner, he typed up, with a typed date of October 9, a termination notice for Lohman which stated that he had been seen leaving the premises with cloth "towels" belonging to Respondent. (Hougham testified that he had not previously seen Lohman take any towels home.) Hougham further testified that early in the afternoon of October 9, in the front vestibule of the building, he told Werner that Hougham had seen Lohman leave "with the towel," had written him up for that, and was terminating him for that, to which Werner replied that Lohman was getting what he deserved for taking the product. On October 7, the day Hougham allegedly observed Lohman leaving the plant with a towel, Werner had told Lohman to wash, iron, and return the towels in his possession; but Hougham testified that during the alleged October 9 Hougham-Werner conversation, Werner said nothing about this October 7 conversation with Lohman. According to Hougham, he gave Lohman this termination slip in the supervisors' office later that day, October 9, shortly after Lohman reported to work at 3 p.m. Werner testified that Hougham came to Werner in his office on October 8, before Lohman punched in at 3 p.m., and said that on October 7 Hougham had seen Lohman leave with cloth "towels." According to Werner, he told Hougham that Lohman had admitted taking company property and had been asked to return it. Werner went on to testify that the afternoon or early evening of October 8, after Lohman started to work, Werner went back to Hougham "to make sure he was aware of what he saw"; that Hougham was sure; and that Werner thereupon instructed Hougham to "go ahead and complete the disciplinary report at the conclusion of the shift, to go ahead and act on the disciplinary report, which is what he did." Werner testified that it was he himself who decided to

[45] This finding is based on Lohman's testimony. For demeanor reasons, I do not accept Werner's denial.

[46] This finding is based on Lohman's testimony. For demeanor reasons, I do not accept Werner's denial.

discharge Lohman. Werner initially testified that Lohman brought back the towels on the afternoon of October 9 and was discharged on the morning of that day. Later, Werner testified that Lohman's separation took place at the close of Lohman's shift, which began at 3 p.m. on October 8. Still according to Werner, he himself reviewed and signed the termination slip on the morning of October 9, after Lohman had seen and signed it. In view of the inconsistencies in Hougham's and Werner's testimony regarding the hour of the day when Lohman received his termination notice; regarding the substance, date, and location of Hougham's alleged report to Werner about Lohman's alleged October 8 conduct; regarding who decided on his discharge; and regarding who initiated preparation of his termination notice, I accept Lohman's testimony regarding what happened after he clocked in on October 8.

Werner initially testified that Lohman was discharged for poor performance and because he admitted removing company property from the premises, then that he was discharged solely for the latter reason and "whether or not he brought [the property] back is immaterial," then that he was discharged on the basis of Hougham's report (received by Werner after Lohman had told him about having several towels at home) that Lohman had removed company property "and the confirmation of the return of company property," and then that Hougham's report "really didn't have anyting to do—that had something to do with the decision, but the fact that Lohman returned with company property was the decision—was the basis in tying the two incidents together for the termination."

Hougham testified that in the summer of 1980, after he told Werner that Hougham had seen Lohman with "towels," Werner told Hougham to get "the towel" from Lohman and let him know that he was not to have any of the towels; and that Hougham did so. Hougham went on to testify that Lohman returned 6 to 12 towels to Supervisor Morrison, and told Hougham that he had brought them back from home. Morrison did not begin working at the Manassas facility until after the Labor Day 1980 weekend, and he testified that his only conversation with Lohman about towels was the conversation (described *supra*) which included Werner and during which Lohman was told to bring back the towels. As found *supra*, this conversation occurred on October 7, and Lohman brought the towels to Werner. I do not accept the testimony of Hougham summarized in this paragraph.

### 4. The discharge of Burrell, Heskett, and Posey; the separation of Payne; further alleged interference, restraint, and coercion

#### a. *Background*

In early April 1980, Respondent discharged employee Spitler for reasons immaterial here. About early July, during a hot spell, Spitler began paying frequent visits to the warehouse, during which he would walk in the freezer "like to cool off." During this period, and prior to August 4, employee Posey made sure that Spitler left the warehouse empty-handed. On August 4, Spitler, who at the time appeared to be under the influence of drugs, came into the freezer and asked Posey, ". . . what can I steal?" Posey replied that he could steal anything he wanted, and that the risk was Spitler's and not Posey's. After seeing Spitler look at two steaks, Posey left the freezer and told Supervisor Streilein that Spitler was going to steal merchandise out of the freezer. Then, Posey returned to the freezer. When he left the freezer, he saw Spitler going back into the freezer with a set of bolt cutters. At this point, Posey again went to Streilein, and said that Spitler had a set of bolt cutters in his hand and was going to cut the lock off the back door. Then, Streilein fetched Warehouse Manager Kimberly. The two of them walked back though the freezer, came back out and went outside, and came back in with Spitler. A pile of merchandise (cases of ham, butter, chicken, and other items) had been stacked (inferentially by Spitler) just inside the warehouse door leading to the railroad tracks; the door lock had been cut and the door had opened;[47] and the merchandise stacked there had fallen from the warehouse to the ground. Kimberly told Posey, Lohman, and another employee to pick up this merchandise, and then escorted Spitler out of the area.

A little later, Kimberly told Werner that Spitler and another former employee were removing cases of merchandise from the premises. The police were called, but before they arrived, Spitler pulled a knife and broke away. The police then left. About 45 minutes later, Spitler telephoned Respondent, admitted what he had done, and asked for the opportunity to return "to make arrangements" with respect to what he had done. Then, he returned to the facility on his own, in a car driven by his father. Almost immediately on Spitler's return, Respondent called for the police again. Before the police arrived, Werner and Kimberly took Spitler to the conference room, where Werner asked if he would please give Werner and Kimberly a written confession concerning that afternoon's activities. Kimberly took down, and Spitler signed, a statement which said, *inter alia*, that Spitler and the other exemployee had moved three cases of meat from Respondent's freezer to the other exemployee's car and had driven off in it. Also, Spitler wrote down a list of other employees and exemployees who, in Spitler's opinion, were actively involved in stealing or eating company property.[48] Among the persons on Spitler's list were employees who will be referred to herein as A, B, C, D, E, and F.[49] The only alleged discriminatee named in either of Spitler's statements was Posey; more specifically, Spitler's statement as written by Kimberly began, "We drove in to Martin Brower. I came in, and met Phil Posey. He told me to do what I wanted. (He left and was not involved.)" Spitler's statements make no reference to his own conduct, seen and testified to by Werner, in pulling a knife on the dispatcher. Spitler's conference with Werner and Kimberly took

[47] Spitler later told Respondent that he had intended to cut the lock, but found that the door was already open.

[48] The items stored in Respondent's warehouse include cookies, frozen fruit juice, and frozen Danish pastry.

[49] In order to avoid possible injustice to such persons' reputation, arbitrarily chosen initials will be used herein to refer to certain individuals accused but never convicted of theft.

about 3 hours, and ended after 10 p.m. During most of this period, the police were waiting for Spitler in Werner's office. Werner testified that Spitler "certainly did not want to be arrested and he did not want to be taken away." On a date not shown by the record, after some plea-bargaining activity, Spitler pleaded guilty to and was convicted of "misdemeanor theft."[50]

In mid-August after Spitler's apprehension, Respondent changed the job title of Klouser from warehouse supervisor to transportation supervisor and assigned him to act as a fourth dispatcher during hours when there might not normally be activity in the distribution center.[51] Also in mid-August, Respondent arranged for more frequent visits to the facility by the county police, and got in touch with a security service to arrange for a security guard. The security service did not have the manpower immediately; but on an undisclosed date before September 16 arrangements were made for a security guard 24 hours a day on weekends, and from 5 p.m. until 8 a.m. during the week. Also, during August and September, Respondent added $5,000 worth of exterior lighting around the perimeter of the building, put combination locks on all the doors, changed all the locks, restricted access to keys, and "aggressively enforced" the existing policy that all doors remain closed and locked. On the Labor Day weekend of August 31-September 2, Respondent transferred two members of management from other facilities to the Manassas facility.

On an undisclosed date prior to September 9, Respondent arranged for a visit to the Manassas facility by Tom Carter, who has at Respondent's Atlanta facility the same responsibility as Werner has at the Manassas facility, and Director of Operations Edward R. Kowalski, who works in Chicago, Illinois, and is Werner's and Carter's immediate superior. On September 9, a date when Spitler appeared in court, he asked Werner if there was any possibility of Respondent's withdrawing the charges. Werner said no. Spitler asked if Werner was aware that the problem he was involved in was still actively going on. Werner said that he was, "to a degree." Spitler said, "even though you got me. . . . it's still happening."

Kowalski and Tom Carter were present at the facility on September 10 and 11. During this period, they interviewed nine persons who were still in Respondent's employ (namely, Posey, Heskett, Laymon, Klouser, and employees A, B, C, E, and G) and also former employee Spitler.[52] Of the nine interviewed persons who were still in Respondent's employ, four (Laymon and employees A, C, and E) were terminated immediately or almost immediately; G was suspended immediately and was later demoted to a job in another facility; and the rest were sent back to work—namely, Posey, Heskett, Klouser, and employee B. My findings as to the content of these conversations are based on a composite of the contemporaneous notes taken by Kowalski and Carter, which the General Counsel offered into evidence without objection or limitation, and credible portions of the testimony of certain persons who were present (namely, Werner, Posey, Heskett, Laymon, and Klouser).

The first two employees to be interviewed, A and C, had both been named in one of Spitler's statements. Employee A stated, *inter alia*, that he had taken trash bags, a couple of salt shakers, cloth towels, and, on two occasions, coffee. He also alleged, *inter alia*, that Heskett had taken a Frisbee. A employee further alleged that employee G, a member of management, had caught another employee stealing, but that employee had been fired for failing to show up; and that employee G had commented that steak and a box or two of chicken were missing. Employee A described Spitler as a "hard junkie" who was "just crazy" and had smoked a "joint" in A's presence. Employee C stated, *inter alia*, that he himself had taken cloth towels. He also alleged, *inter alia*, that Heskett had got 20,000 towels, had opened boxes every week, had eaten a lot of chocolate chip cookies, and, when the facility opened up, had taken a couple of slices of cheese. Werner testified that employee C said Heskett had opened boxes of individual portions of jelly, ketchup, fruit juice, and sugar cookies; no such notation appears in Kowalski's or Carter's contemporaneous notes. Employee C further stated that he had seen Spitler shooting "dope" in the toilet; that Spitler was "always wired up" and sold marijuana; that employee C had heard a report that Spitler had named employees A, C, and E as "taking stuff" because "he had it against us"; that employee C smoked marijuana at home; and that employee C "would guess" employee E used it. Both employees A and C were terminated that same day.

Spitler, whose criminal prosecution was still pending, was the third person interviewed on September 10. Spitler admitted having been "high on drugs" and stealing a number of items from Respondent, including an American flag. He alleged, *inter alia*, that employee G had taken orange juice and probably more; that "maybe" employee D had stolen things; that employee C had taken a flag; that employee B had been a "pusher" of marijuana and "pills"; that employee E had been a "pusher" of marijuana, "hash," narcotics, and other drugs, and had been given chicken by Spitler; that Posey had seen Spitler steal cases of bacon, cheese, eggs, and potatoes every month or 2 weeks; and that Heskett had taken something "petty, but daily."

Then, Posey was called in. In response to questions, he described his participation in the events which led to Spitler's August 4 arrest, and said that he knew Spitler had been back to the building on previous occasions.[53] Posey said that he had stolen a truck 7 years earlier, when he was 17 years old, and that employee B was his best friend and was "quite tight" with Spitler. Posey said that third-shift employee Laymon had a job lined up

[50] Werner swore out a warrant for the other exemployee's arrest, but the police could not track him down. As of March 16, 1981, that warrant was still outstanding.

[51] My findings in this sentence are based on Werner's testimony on direct examination as Respondent's witness. Cf. *infra* fn. 64.

[52] A tenth employee came to the office on his own initiative on an errand unrelated to the theft investigation. After being asked a few questions, he walked out of the plant and never returned.

[53] This finding is based on Werner's testimony, which is consistent with Posey's testimony and Kowalski's notes. Carter's notes allege that Posey said he "saw" Spitler taking certain items "Before [he] reported him August 4." Posey testimonially denied having been seen Spitler take anything before August 4.

with an employer whose name and address Posey gave, and that Laymon was going to quit Respondent's employ as soon as he finished his training. Posey said that Laymon did not care how the freezer was kept or how it was run, and asked if Posey could be transferred to the third shift when Laymon left. Posey said that Laymon and employee H[54] had made statements to Posey which indicated that they had been stealing, but Posey had never seen them take any merchandise. Posey was asked whether the employees ever put anything extra on the trucks to enable the drivers to keep it. Posey said no. Kowalski said that "I understand" Heskett had 10,000 cloth towels, after which management started "cracking jokes" about Heskett's allegedly putting towels in the produce room and in the thermal container which he left in the cooler dock, and about his allegedly removing hamburger meat from the freezer, carrying it to the cooler dock, and removing it from the premises. Posey said that nobody came to the freezer and took anything without his knowing about it. Posey was asked whether he had taken Pittsburgh Steeler glasses (see *infra* at fn. 97). He said no. Posey was asked if he had taken anything. He said no, except for a case of greasy towels which he had found in the dumpster.[55] Kowalski told him that he had been doing a fine job, and told him to go back to work.

The next employee interviewed was employee B. He said, *inter alia*, that he "may have" two or three cloth towels, that employee E had taken some cheese, and that employee B had failed to report seeing Spitler put $500–$600 worth of Respondent's product in the car of employee C, who drove employee B home. As to this interview, Kowalski's notes state, "Heard Phil a Steelers Cup-Case but don't know"; Werner testified that employee B "identified" Philip Posey "as having removed [a case of] Pittsburgh Steeler glasses from our inventory." Employee B described Spitler as a "junkie." Spitler had described employee B as a pusher or user or marijuana and "pills." Posey had alleged that employee B used "dope." Employee B was not discharged at that time.

Then, management interviewed employee Laymon. Kowalski and Carter asked whether he was going to leave Respondent's employ. He said that he had been looking for a job, but had no immediate replies. Management asked whether he wanted any type of recommendation, and whether, when he left, he wanted Respondent to report that he was fired for stealing. Laymon, who had recently decided to marry a woman with whom he had been keeping company, said no. Laymon asked Werner whether Kowalski and Carter would pursue any statement Laymon made. Werner said no. Management said that if Laymon told the truth about his own activities Respondent would tell prospective employers that he had resigned. Laymon credibly testified that he understood that he would not be sent to jail if he told the truth.

Management then asked him a number of questions. After he had answered them orally, management gave him a pen and a piece of paper, and told him to write down everything he could remember. After he had completed writing his statement, management told him to sign and date it. Management then read the statement.

Laymon's written statement asserted, *inter alia*, that at the request of Supervisor Klouser, who was then Laymon's and Burrell's immediate superior, Laymon and employee I had put steak, cake, and "fries" (potatoes cut up for frying and then frozen) into Klouser's car, and Burrell had put "fries" and "blue meat" (quarter-pound frozen hamburger patties) into Klouser's car in the winter of 1979. Further, Laymon's statement asserted that in the winter of 1979 Burrell had removed eggs and cheese for personal consumption;[56] and that Heskett had removed cloth towels "and other items" during summer, fall, and the following months of 1979 and 1980 and "second week in August Heskett removed flags, 15 to 25 from warehouse, spring '80."[57] Laymon's statement further alleged that employee B had offered "Black Beauty" pills to "keep going," and had offered in March or April 1980 to sell Laymon "coke." Laymon's statement further alleged that employee I had taken orange juice. Also, Laymon's statement alleged that employee D had taken 30 to 50 50-pound cases of "blue meat," 8 to 10 cases of hash browns, 20 to 25 cases of orange juice, and 15 to 20 cases of bacon; and that he had offered to sell Laymon some of this merchandise. Laymon's statement asserted that he himself had taken grapefruit juice, steaks, and a napkin holder. In addition, Laymon's statement contains language suggesting that he and employee H had removed money from a soft drink vending machine.

Carter's and Kowalski's notes of this interview, and to some extent Laymon's testimony, show that Laymon made certain other allegations which were not included in his written statement. Thus, Kowalski's notes state, "Posey asked for glasses (Pittsburgh Steelers) I didn't," followed by words which I am inclined to read as "do it." Such notes further state, "Phil asked to remove frozen product from him/meat, OJ, steaks." Carter's notes state, "Posey wanted glasses—Steeler," and then, in much smaller handwriting, "meat, OJ, steaks." Werner testified that Laymon "identified" Posey as having "removed Pittsburgh Steeler glasses from our inventory."[58] Further, according to Carter's and/or Kowalski's notes, Laymon said during the interview that he had taken a case of glasses and a McDonald flag, that Heskett had taken "thousands" of cloth towels, and that Heskett had "to have one or two of every item in the warehouse," including window cleaner (see *infra*, The Remedy). These matters were not included in Laymon's statement.

[54] See *supra* fn. 49. Employee H was discharged on September 14 for suspected theft. A different employee with the same name was in the unit on October 6.

[55] Posey had found this case in the dumpster when he went out to empty some garbage. After his shift was over, he removed them from the dumpster and openly carried them in his hand out the door and into his car. He took them home, washed and bleached them, and kept them.

[56] Kowalski's and Carter's notes specify dozens of eggs several times. Kowalski's notes specify two bricks of cheese "in lunch box."

[57] Carter's and Kowalski's notes identify these as McDonald flags.

[58] Laymon testified before me that he could not recall whether during the September 10 interview he mentioned the alleged incident involving Posey and the Pittsburgh Steelers glasses.

After reading this statement, management did not point out these omissions to him.

After signing this statement, Laymon resigned, and went to his locker with Werner to obtain personal belongings. Management told Laymon never to get in contact with Respondent and never to return to the premises, and he complied with these instructions. Thereafter, Laymon obtained a job in a warehouse being operated by another firm. In his employment application he put Respondent as his prior employer. Laymon testified without objection that his new employer told him that Respondent had given him a good recommendation.

Laymon's interview ended at 1:15 a.m. on September 11. The next interview took place about 11:30 a.m. that day, with employee E. He stated, *inter alia*, that employee B "probably stole product." As to E's allegations regarding Burrell, Carter's notes state in their entirety, "James [illegible] [Burrell] knows—Sent girl friend up for Customer P.U. [Burrell] told him 3rd shift"; and Kowalski's notes state in their entirety, "Burrell told about [illegible name beginning with J] making out customer pick up 1-1/2 yr. ago—Sent girl here as cust to pick it up—Don't know what [Burrell] stole but I know he's taking stuff. He said 3rd shift is easy to work cause nobody here to watch it." On direct examination, Werner, who was present during this interview, testified that employee E identified Burrell as having removed produce items (testimony which I do not believe, in view of Kowalski's inconsistent notes and for demeanor reasons) and also as "identifying the fact that third shift was very opportune shift to work for the removal of company property." As to employee E's allegations regarding Payne, Carter's notes state in their entirety, "Cheese in lunch boxes Payne-Super Man pushes too hard," and Kowalski's notes state in their entirety, "Some Boys took cheese out in Lunch Boxes (Frank Payne)." Werner testified that employee E identified Payne as having removed cheese and (from time to time in Werner's testimony) other produce items (see *infra* sec. II,D,1). Employee E was discharged that same day.[59]

Employee Heskett was also interviewed on September 10 or 11; Carter asked the questions in the presence of Werner and Kowalski. Carter asked whether Heskett knew about anyone who had taken five cases of promotional Pittsburgh Steelers glasses (see *infra* at fn. 97). Heskett said that he had no knowledge whatever of the incident. Carter asked if Heskett knew if anyone was taking any of the McDonald corporate flags. Heskett said no. Carter asked who would want one. Hesekt said that he did not know.[60] Carter asked if Heskett knew of anyone who was taking meat, cheese, or lettuce. Heskett said that two named employees who had been terminated some months earlier had boasted that they had done so. Management asked whether Heskett had been taking cloth towels. Heskett said that he had some cloth towels. Heskett stated that in late spring, Warehouse Manager Kimberly had told the employees to stop breaking into cartons of juices, cookies, and cloth towels. Heskett went on to say that, on this occasion, Kimberly said that thereafter he would from time to time authorize the placement on a supervisor's desk of a box of cloth towels which the employees could use for sweat towels; and that, thereafter, nobody opened boxes of cloth towels without authorization. Heskett further said that during the summer of 1979, Kimberly had told the employees that they could use and take home the tubes of orange juice in damaged cases, but that this practice had ended about September 1979. Heskett further stated that Ballentine, Werner's predecessor as center manager, had issued a memorandum that any employee who was caught consuming articles owned by Respondent would be immediately terminated. Carter asked whether Heskett had any ideas about how to control theft at the plant. On the basis of some business management courses which Heskett had taken, he suggested some internal control techniques, and also suggested that damaged goods be given or sold at discount to employees. Carter told Heskett that if he saw anyone taking anything, to write down the person's name, put the paper in an envelope, and give it to the supervisor or the warehouse manager, and that Heskett's name would be held in confidence. Heskett was thanked for his time, and told he could go back to work. He did so. During this interview, nothing was said about Heskett's putting his lunchbox in the cooler area of the warehouse, or about discharging or disciplining Heskett in connection with towels or any other matter.[61]

The next to last individual to be interviewed was Klouser, whom Werner at Kowalski's instructions called in from home to be interviewed. Werner testified that he attended all the interviews except the first and third (with employees A and C, respectively) and the last two (with Klouser and another member of management employee G). Werner testified that Kowalski and Carter decided to interview these last two outside Werner's presence, that Kowalski and Carter did not explain why, and that Werner did not ask why.[62] For demeanor reasons, I accept Klouser's testimony that Werner was present during Klouser's interview. Klouser was asked who was stealing meachandise. Klouser replied that so far as he knew nobody was stealing anything. Management said that two or three witnesses had seen him stealing. Klouser said that he had taken merchandise for his personal use. Management asked who else had been taking merchandise from the warehouse. Klouser said, *inter alia*, that Burrell, Heskett, and employee D had taken mer-

[59] As an adverse witness for the General Counsel, Werner testified that E was discharged for the use and possession of drugs as well as the awareness of theft of company property. As a witness for Respondent, Werner testified that E was discharged for theft.

[60] In 1966 and 1967, when Heskett was in high school, he had started a collection of corporate flags. At the hearing, he admitted having one McDonald's flag, which according to him was sent to him by McDonald's at his request, and before he began working for Respondent. See discussion under The Remedy, *infra*.

[61] My findings as to the contents of the interview are based on Heskett's testimony, much of it uncontradicted. For demeanor reasons, I do not accept Werner's testimony that during this interviews, Heskett admitted taking an unspecified number of packets of salt, jelly, and ketchup, other small items that could be concealed in his lunchbox, and, possibly, American flags. Kowalski and Carter did not testify, and Kowalski's contemporaneous notes (see text attached to fn. 65, *infra*) were not produced.

[62] However, just before Werner so testified, I asked him, "Did you notice whether Mr. Kowalski was writing during the interviews with Mr. Heskett and Mr. Klouser?" Werner did not then say that he did not attend the Klouser interview, but instead testified, "I don't believe that [Kowalski] made any written entries during that period of time."

chandise, and that employee Posey may have done so. Klouser said that Burrell had been taking things from Respondent for personal use, and described one alleged incident where Burrell and former employee J had taken a case of meat and Burrell "got uptight" because he had not received his share. Management said that for Klouser's misconduct and mismanagement he was to tender his resignation effective no later than October 15, giving a reason and a date. Klouser prepared a written summary of his allegations regarding the dishonesty of persons other than himself.[63] Klouser testified that he "owed it to Mr. Werner" to write this summary because Werner had said that he was not going to press charges against Klouser for taking merchandise, but that Werner just wanted him to leave.

No later than September 23, Klouser told Werner that Klouser was resigning effective October 15. Klouser was actively employed in the warehouse as a third-shift dispatcher/supervisor until October 8, and remained on the payroll until the week ending October 15, for which week he was paid for vacation days he had accumulated. As previously noted, Werner testified on direct examination that Klouser had been assigned to work as dispatcher/supervisor on this shift in order to "complement" the security guard during hours when there might not normally be activity in the distribution center.[64] Klouser testified for Respondent upon being advised by Werner that Klouser had been subpoenaed, and without receiving the subpoena. He wore to the site of the hearing a garment which (he had admitted to Burrell) Klouser had taken from then Warehouse Supervisor Kimberly's office.

Later that afternoon employee G was interviewed. He stated, *inter alia*, that he thought Posey, employee B, and others used marijuana. Employee G was immediately suspended.

Kowalski and Carter both took notes of the September 10 and 11 interviews. General Counsel's Exhibit 46, which consists of notes taken by Kowalski, contains rather detailed notes of all the interviews except those with Heskett and Klouser, whose interviews are not described at all. Heskett credibly testified that Kowalski took notes during Heskett's interview with Kowalski, Carter, and Werner,[65] but such notes were not produced, nor was their absence explained. Nor does the record explain the absence of notes by Kowalski about the Klouser interview. Werner testified that on September 11, Kowalski and Carter gave their notes to Werner, who xeroxed them and returned the originals.

Werner admitted that between the September 10–11 interviews and the separation of Burrell, Heskett, Posey, and Payne, Werner learned nothing of substance about their alleged dishonesty that he had not previously known (see also *supra* at fn. 63). On September 16, Werner advised Respondent's security service, in writing, of the names of the employees who were to be admitted to the premises. Included were the names of Payne, Burrell, Heskett, Posey, Jolley, and employees B and I. The letter stated that Laymon and employees A, C, E, G, and H (*inter alia*) were "unauthorized on the premises for any reason." On September 30, Werner went to Quebec, Canada, to attend the annual meeting of Respondent's distribution center managers. Also present were, *inter alia*, Kowalski and Director of Industrial Relations Siebert; their alleged conversations with Werner are discussed *infra* section II,D,1.

Werner came home late Friday night, October 3. He went to the warehouse on October 4 (the day of the union meeting) and on the evening of October 5. As described in detail, *infra*, the October discharges allegedly for suspicion of theft began on October 6.

On October 9, Werner conducted a meeting of all first, second, and some third-shift employees. He said that Respondent had been conducting an investigation of the theft of company property, that Respondent felt it had concluded the major portion of its investigation, and that there was nothing for anyone to be further concerned about regarding his job.

### b. *Burrell*

Gary William Burrell was hired by Respondent in March 1979 at $5.40 an hour. In June 1979 he received an increase to $6, inferentially in connection with completing his probationary period. In August 1979, he was promoted to leadman, and his hourly rate was increased to $6.25. He worked on the third shift until May 1980, when he started working on the first shift.

On an undisclosed date in late June or late July 1980, Werner made an "initial overture" to Burrell about a supervisory job. The two discussed it casually during the course of the workday later in the summer. In late August 1980, then Warehouse Manager Kimberly approached Burrell and told him that he could have the job of warehouse supervisor on the third shift if he wanted it. The following day, Werner "basically" offered Burrell the job, but said that it would take up a lot of Burrell's time and he might have to give up his part-

[63] As photocopied, this summary consists of two pages, each signed by Klouser (the second page in two different places, but this may originally have been two separate sheets) but none of them dated. Both Klouser and Werner testified that Klouser wrote these pages on Friday, September 26. However, Klouser testified that he was alone when he wrote them, and Werner testified that he was present when Klouser wrote them. Also, Klouser testified that he did not speak about theft with Werner between the Kowalski-Carter-Werner interview and Klouser's preparation of these pages, while Werner testified to three conversations during this period. Furthermore, although Burrell was not terminated until October 6, Klouser, whose last day of active employment was October 8 and who was dropped from the payroll on October 15, stated in his alleged September 26 memorandum that Burrell had been taking merchandise from Respondent "for his last 9 months he was there." In any event, although Werner initially testified that until October 6 he had no information from Klouser implicating Burrell or Heskett, Werner eventually corroborated Klouser's testimony that the alleged September 26 documents contained a summary of what he had told Werner, Kowalski, and Carter on September 11. Carter's September 11 notes contain little reference to the Klouser interview and, for reasons unexplained in the record, Kowalski's otherwise detailed September 11 notes did not advert thereto.

[64] On cross-examination, Werner testified that Klouser was "not really" supposed to be helping the security guard, that Klouser was working on the third (11 p.m. to 7 a.m.) shift with another supervisor whom Werner did not identify, and that Klouser had been assigned to this job because "the high degree of activity in the transportation office really necessitated some help down there."

[65] For demeanor reasons, I do not credit Werner's denial. See *infra* at fn. 87.

time job with another firm, A & P. Burrell said that he was unsure whether he wanted to go back to the third shift. Werner said that he would give Burrell more time to think about the promotion. About September 1, Werner said that the job was Burrell's, and gave him until September 15 to give a definite answer. Burrell did not give Werner a definite answer by September 15. About the third week in September, Werner asked him if he wanted the supervisory position.[66] Burrell still failed to give a definite answer. Before Werner's September 30–October 3 trip to Quebec, management did not interview Burrell regarding theft. As described in greater detail *infra* section II,B,4,e, in mid- or late September Werner told employee Payne that Burrell was a good employee and was not going to be fired.

As to some extent noted previously, Burrell was the first of Respondent's employees who discussed unionization with the M & M driver and with a union representative. Burrell attempted to obtain other employees' names and addresses so authorization cards could be mailed to them, initiated and participated in the October 2 arrangements for the October 4 union meeting, with a clipboard sat up at the front of that meeting, signed a card there, handed out cards to other employees, and urged other employees to support the Union.

Burrell's work shift began at 7 a.m. The morning of Monday, October 6, was a foggy morning. When Burrell parked his car in the company parking lot that morning, he parked across the line between two parking spaces. About 8 or 9 a.m., Burrell was approached by Warehouse Manager Streilein, who had seen Burrell leaving the Holiday Inn after arranging for the October 4 meeting and in the afternoon of October 4 had been advised of the union meeting that morning. Streilein gave Burrell a disciplinary report based on his taking two parking places, and signed by Streilein and Werner. This was the first such report Burrell had received in 18 months of employment. Burrell said, ". . . this is crazy . . . that man is just picking at little [things]." Streilein replied, "I know, but I've got a job to do." Burrell explained that it was foggy, and remarked that Werner had not warned him about this kind of parking before, when Burrell had done it intentionally.[67] Burrell then told Streilein to tell Werner that the employees had had a meeting at the Holiday Inn. Streilein said that he knew all about the Holiday Inn and about the union cards being signed. Burrell told Streilein to tell Werner that Burrell was going to vote for the Union. Streilein then told Burrell to go back to work.

Later that day, Streilein told Burrell that Werner wanted to see him in the office at 3 p.m. "on your time." After punching out at 3 p.m., Burrell's usual hour, he went to Werner's office, where he found Morrison and Werner. After making some small talk, Werner asked whether Burrell had considered the supervisory job. Burrell said that he had decided not to take it because he did not want to work third-shift hours (11 p.m. to 7 a.m.). Werner said, ". . . that's too bad," and asked how Burrell would like to work second shift. Burrell asked whether he had a choice. Werner said, "what do you think?" Burrell said, "I don't know, that's why I'm asking." Werner asked whether a second-shift schedule would conflict with Burrell's part-time job for A & P. Burrell said that A & P would "work around" his job for Respondent. Werner said, "that's too bad, you won't have to worry about it anyways."

Then, Werner took some colored markers from his briefcase, named a color for Heskett and a color for employee B, and then picked a color for Burrell. Thinking Werner was going to give him the marker, Burrell went to get it, whereupon Werner told him to sit down. Then, Werner asked, "How were the Pittsburgh Steeler glasses?"; there is no evidence that anyone had ever alleged to Werner that Burrell had taken such glasses. Burrell replied that he did not know, that he had never seen one, and that these glasses were kept in the "dry" section of the warehouse whereas he worked in the freezer section. Werner told him to look at one in Werner's bookcase. Burrell looked, and then said, "this is crazy, I don't have any of those things." Werner asked him how the "blue meat" and "red meat" had been, and about some cheese and egges in his lunchbox. Burrell replied that he did not know what Werner was talking about, and denied even having a lunchbox. Burrell further said, ". . . this is what I get for being loyal" to Respondent. Werner said that Burrell had commented it was easy to steal on night shift. Burrell said that he did not recall saying that.

Werner asked what Burrell had that was Werner's. Burrell said that in his locker he had a freezer suit, a clipboard, and pens. Werner told Burrell to clean out his locker. Burrell asked whether Werner was firing him. Werner said "yes. . .Burrell, you're history," told Morrison to walk Burrell to his locker, and told Burrell not to come back on the premises, that his paycheck would be mailed to him. Morrison walked Burrell to his locker. Burrell remarked that Werner was "crazy." Morrison asked why Burrell had not disagreed with Werner. Burrell replied, "it doesn't do no good, it's like talking to a wall . . . I'd get better action elsewhere." He gave Morrison Respondent's property and left the premises.[68]

For unexplained reasons, Burrell's termination notice is dated October 27, 1980, 3 weeks after his discharge. "Dishonesty" is checked, and under "Remarks" is the assertion. "Employee was implicated in theft of company property, terminated 10/6/80."

### c. *Heskett*

William Leo Heskett was hired by Respondent in February 1979, at $5.40 an hour plus a 15-cent shift differential. In March 1979 he received an increase to $6 an

[66] This finding is based on Werner's testimony. I discredit as highly improbable Werner's testimony that he asked Burrell about the supervisory job in order to induce Burrell to volunteer the truth about the theft situation. Such remarks would be unlikely to stimulate a truthful confession, let alone a truthful protestation of innocence.

[67] The complaint does not allege that the issuance of this disciplinary report was unlawfully motivated.

[68] My findings as to the discharge interview are based on Burrell's uncontradicted testimony. Morrison testified that he was present to serve as a witness during a conversation after October 3 between Burrell and Werner, but that Morrison could not remember what was said, or whether Burrell was discharged or merely talked to. Werner was not asked to describe the discharge interview.

hour, inferentially because he had completed his probationary period. In March 1980 he received an increase to $6.48 as part of an annual wage adjustment for the facility. In late June 1980 he received a written disciplinary report for improperly stacking freight on the pallets. In early July, he received a written disciplinary report for building poorly constructed pallets and for failing to adhere the color coded dots (used to help the driver in unloading and the customer with his product rotation) to a route he picked. Employee Zoretic testified that Heskett was one of the fastest pickers.

Beginning in the summer of 1979, Heskett used around the plant, as sweat rags, towels taken from the boxes made available to the employees before April 1980 and, on four occasions, towels taken from the "recoup" area or given him by the mechanics. As previously noted, in April 1980 Werner saw him with two new towels, found out from him that he had obtained them from a box made available by supervision, and then put a stop to the box practice. Thereafter, Heskett continued during hot weather to use towels as sweat rags around the plant. Nothing was said to Heskett during this period about this practice.[69] Indeed, when telling Heskett to come to the interview with Kowalski and Carter on September 9 to 10, Werner told him to bring a towel as his "trademark." As previously found, during this interview Heskett said that he had some towels, and described the discontinued practice of making them available for employees to use as sweat towels. It is uncontradicted that during this interview nothing was said about discharging or disciplining him in connection with towels or any other matter.

Heskett attended the October 4 union meeting at the October 2 urging of Burrell and Reid while at the warehouse, and signed a card there. Heskett worked a shift on Sunday, October 5, beginning at 6 a.m., and reported to work at 3 p.m. on October 6. At or about 11 p.m., near the end of his regular shift, Heskett was called to Werner's office, where Heskett found Werner and Morrison. Werner remarked that he had only two different colors of Magic Markers. He said that he had heard that Heskett had some complaints about the new picking system (see *infra* sec. II,C). Heskett said nothing. Werner asked Heskett if he knew what Armageddon meant. Heskett said that it had something to do with the end. Werner said that he had information that Heskett had taken 16,000 to 20,000 cloth towels, but that Werner did not really think the figure was that high. Heskett said that he had 16 to 30 towels, that he was using them as sweat rags, and that in 1979 Warehouse Manager Kimberly had authorized their use for that purpose and to clean up spills and other messes. Werner said that, before sending Heskett "down the road," Werner wanted to tell him why he was there. Werner said that he had information that Heskett was accumulating mass quantities of cloth towels. Werner further said that he had information from a former employee that Heskett had been taking lettuce, cheese, and meats. Heskett said that he had not taken any of these. Werner said, "Well, I didn't say you stole it." Werner said that he had information from a former employee that Heskett had been taking Frisbees, and that Werner had information that Heskett was breaking into cases of juice and cookies for his own consumption. Heskett did not reply. Werner said that his lawyer was in the other room. Towards the end of the conversation, Werner said, "I frankly don't give a damn how many towels you have taken. As far as I am concerned, you can hold a huge yard sale with them or use them for rags for your car. But if I ever catch you coming back here again or on this property, I will call the police and have them throw you in jail." Werner said nothing about flags, packets of jelly or condiments, promotional glasses, Heskett's putting his lunchbox in the cooler area of the warehouse, or having moved items from the plant in his lunchbox. Nor did Werner tell Heskett the names of the persons who had allegedly accused him of theft, or the dates when he had allegedly taken things.[70]

For unexplained reasons, Heskett's termination notice was not prepared until October 27. "Dishonesty" is checked, and under "remarks," in Streilein's printing, is the assertion, "Employee was implicated in theft of company property."

### d. *Posey; alleged unlawful interrogation by Supervisor Werner*

Phillip Isaac Posey was hired by Respondent in December 1979 at $5.40 an hour. A few days later, Supervisor Hougham told him that he had caught onto his job very quickly and was very accurate. He later received an increase to $6, inferentially in early February 1980 when his probationary period expired. On February 20, 1980, he received a written disciplinary report for being 5 minutes late to work. In March 1980 he received an increase to $6.48 as part of an annual wage adjustment at the facility.

On an otherwise undisclosed date between August 5 and September 9, Werner asked Posey about stealing in the warehouse. Posey said that he knew from "warehouse talk" that stealing was going on, but had not actually seen anyone steal anything. Werner asked Posey about some Pittsburgh Steeler glasses (see *infra* at fn. 97). Posey said that he had not seen any. Werner showed him one, and asked what he knew about it. Posey said that this was the first time he had seen such a glass. Werner asked Posey to quit toying with Werner and to tell the truth. Posey said that he was telling the truth. Werner said that people were walking out of the front of the warehouse with merchandise. Posey said that he was not aware of that. Werner said that it might take him 1 to 2 years to get the thieves, but he would get them, and see to it that they were sent to jail and their families were

[69] This finding is based on Heskett's testimony. For demeanor reasons, I do not accept Streilein's testimony that he told Heskett in late April or early May 1980 not to use towels, and never thereafter saw him with towels; or Werner's testimony in effect, that he never saw Heskett with towels after June 1980.

[70] My findings in this paragraph are based on Heskett's testimony, much of which is uncontradicted. For demeanor reasons, I do not accept Werner's denial of the remarks about the picking form, his indifference to the number of towels Heskett allegedly took, and the presence of a lawyer. I do accept Werner's denial that during this conversation his lawyer was nearby, and conclude that Werner's contrary claim to Heskett was designed to discourage Heskett from strongly protesting his discharge.

put out in the cold. Werner did not ask Posey to give a written statement, write him up for anything, or say anything about discharging him.

As summarized *supra* section II,B,4,a, Posey was among the employees interviewed on September 10 and 11 by Kowalski, Carter, and Werner. On an undisclosed date between that interview and September 23, Posey went to Werner's office and asked for a transfer from the second (3–11 p.m.) to the third (11 p.m.–7 a.m.) shift in order to enable Posey to perform his National Guard duties. Werner said that he would see what he could do about it. Posey asked whether Werner wanted him to pay for the box of greasy cloth towels which he had retrieved from the dumpster and taken home, and offered to write him a check. Werner said that this was water under the bridge, and that Posey should let his conscience be his guide. Posey said, "fine, then you won't get any money." Werner did not ask him to give a statement, did not write him up, did not tell him to bring the towels back, and said nothing about discharging him. He was transferred to the third shift on September 23.

Posey attended the October 4 union meeting and signed a card there. Late in the evening of October 5, while Posey was working with employee Williams (who had not attended the meeting and had not yet signed a card), Werner approached Posey; patted him on the back; and said, "do you really think this will get off the ground?" Posey did not reply. Werner walked away chuckling.[71] After finishing his shift, which ended in the morning of October 6, Posey gave out cards in the plant parking lot to Williams, who signed and returned his card immediately, and another employee. There is no evidence that management observed this activity.

Supervisor Morrison testified that on October 6 or 7, Werner showed him some notes of employee interviews, said that a few former employees had alleged that Posey had taken a "product" or "things" from the building, and said that "from the notes that they had taken, from talking to him, and et cetera, that he was to be let go." About 1:30 a.m., on October 7, Supervisor Hougham told Posey that Supervisor Morrison wanted to see him. When Posey entered the office, he found Morrison and Transportation Supervisor Ralph Carroll. Morrison asked what had been going on in the last couple of months. Posey described the Spitler incident. Morrison asked whether Posey had ever stolen anything. Posey said no. Morrison said he had a written statement from someone whom he did not identify that on a date Morrison did not specify, Posey had stolen some Pittsburgh Steelers glasses. Posey denied taking anything, and said that Werner and the police could go to Posey's house "right now and . . . check it out . . . because I don't have nothing to hide at all." Morrison rejected this suggestion, and said he had another written statement, from someone whom he did not identify, that Posey was not trustworthy. Posey said, "that is their opinion." Morrison asked if he had ever seen anyone stealing anything. Posey said that he was not hired to babysit, but was hired to load trucks and make sure they were out on time. Posey said that the only thing he had ever taken was the greasy cloth towels which he had taken because he considered them public property. Morrison said that they were Respondent's property until they left the lot, but did not ask Posey to return the towels. Morrison said that Posey had two alternatives, to resign or be fired. Posey said that Morrison would have to fire Posey because he was not going to quit. Morrison said that he was going to fire Posey, who said "that it wouldn't hold up in court at all," that Posey knew he was "right." Morrison said nothing about Posey's giving a written statement, and he did not give one. At Morrison's instructions, Carroll escorted Posey out of the building.

On October 16, 1980, Warehouse Supervisor Streilein advised the Virginia Unemployment Compensation Commission that Posey "was implicated in theft of company property." On October 27, more than 2 weeks after Posey's discharge, Streilein prepared, and he and Werner signed, an employee disciplinary report in which "Dishonesty" was checked, and containing under "Remarks" the statement, "Employee was implicated in theft of company property." That same day, they both signed a "change of status" form also stating that Posey "was implicated in theft of company property." When testifying as the General Counsel's first witness, Werner initially testified to being "sure" that he consulted someone, probably Kowalski, about Posey's discharge before deciding to discharge him, and that the reasons for Posey's discharge were "Implication in an act and awareness of a theft of company property." Then, Werner testified that Posey was fired "for theft." A little later, Werner testified that he did not recall consulting anyone about the decision to discharge Posey, and that Posey's awareness of theft "contributed to" the overall decision to discharge him. When testifying for Respondent 3 weeks later, Werner testified that Posey was discharged because Laymon and employee B had identified him as having removed Pittsburgh Steelers glasses from Respondent's inventory. The last day of the hearing, Werner indicated on cross-examination that Posey was discharged partly because Klouser told Respondent that he had received reports from other employees, who were themselves engaged in theft, that Posey was stealing also.

e. *Payne*

Charles Franklin Payne was hired by Respondent in February 1979. He was a leadman throughout his employment. In March 1980, he received an increase from $6 to $6.48 an hour as part of an annual wage adjustment for the Manassas facility. In the summer of 1980, then Warehouse Manager Kimberly repeatedly urged Payne to accept a supervisory position, telling Payne that he would be a good man for the job. Payne refused the promotion, telling Werner that Payne did not feel that he could handle the job. Payne never received any writeups of any kind. Werner and all the supervisors had thanked Payne for doing a good job. In mid- or late September,

[71] This finding is based on Posey's testimony. Williams was called by the General Counsel as a witness, but was not asked about this conversation. Werner denied making this statement, and further denied in his testimony that he never talked to Posey on this date. However, Werner admitted having told a Board investigator that he may have said hello to Posey that day. Werner's testimony in other respects contains a number of internal inconsistencies. For this and demeanor reasons, I credit Posey notwithstanding Williams' failure to corroborate him. See *infra* at fn. 87.

Payne approached Werner and asked whether Payne was going to be the next to be fired. Werner replied, "No . . . you're honest, you're obviously a good employee and so [is] Gary Burrell. Y'all done real good work for me."[72]

As previously noted, employee E had alleged during his September 11 interview that Payne had taken cheese out in his lunchbox. Payne was not interviewed in September about alleged theft. As previously noted, he was one of the three employees who on October 2 made arrangements at the Holiday Inn for the October 4 meeting, and were seen and hailed by Supervisor Streilein as the three left the Holiday Inn that day. Payne thereafter urged other employees to come to the meeting. He himself attended that meeting and signed a card there.

At about 11 p.m., on October 7, Supervisor Morrison told Payne that Werner wanted to see him in Werner's office, and escorted him there. Morrison remained in the office during the interview. Werner asked what Payne would do if Werner offered him a supervisor's job. Payne said that he would probably be "real happy." Werner asked why Payne had not asked for the job after Burrell turned it down. Payne replied that because of the pressure Werner put on, Payne did not think he could work under Werner as a supervisor.

As previously noted, after obtaining from Payne the admission during this conversation that he had attended the October 4 union meeting, Werner evinced the correct suspicion that Payne had participated in setting up the meeting. Werner pulled out some white paper with writing and different color pencil marks through it; said that each person he was discharging would have a color; and said that Payne was going to be orange, Heskett was going to be blue, and employee B was going to be pink. Without giving dates or naming the accuser, Werner said that he had proof that someone on the first shift, to which Payne was assigned, had said that Payne had taken cheese, eggs, and meat. Payne said no, that he did not know what Werner was talking about,[73] and that Payne could not have taken these items because he did not work in the department where they were kept.[74] Werner said, "okay, never mind," and asked who was stealing. Payne said that he did not know. Werner said that he thought Payne was a liar, and that he would be given an alternative, "I'm either going to let you voluntary resign or I'm going to send you out the door like a rocket." Payne asked whether, if he resigned, Werner would give him a good reference. Werner said yes, and asked him to write out a resignation. Payne said that he did not know what to say, he could not spell very well, and his hands were trembling so much that he could not write. He asked Werner to write a resignation for him. Werner thereupon wrote out and dated a statement that Payne was voluntarily resigning for personal reasons, effective immediately. At Werner's request, Payne not only signed his name in cursive writing, but also handprinted his name and dated the document. Respondent frequently does not obtain the written resignations of employees, even after they have given oral notice of resignation some time before the effective date.[75]

During the investigation of the case, Werner told the Board investigator that Payne was a voluntary quit, and that Respondent would have liked to keep him as he was the leadman on the first shift and one of the most senior employees of the warehouse.

5. The allegedly discriminatory discharge of Walton

Kenneth Ray Walton started working for Respondent on July 9, 1979, at $6.50 an hour. He thereafter received increases or an increase to $7, and effective March 3, 1980, he received an increase to $7.56, which his personnel folder attributes to "Annual Wage Adjustments."

Walton was initially attached to the warehouse department. He spent most of his time performing warehouse maintenance work. However, on an emergency basis he performed work on the Thermal King refrigeration units used in Respondent's trailers.[76] Walton had a substantial amount of previous training and experience which qualified him to perform much of the maintenance work on such units. On various occasions beginning about June 1980, he asked Transportation Supervisor Art Neville for a transfer to the transportation department, in order to enable Walton to perform work on the Thermal King units. When he made these requests, Neville told him that if he was transferred, he would be needed the hours the trailers were there. Neville testimonially identified these hours as the second shift; but see *infra.*

About late July 1980, Respondent hired Nelson Michael as a mechanic attached to the warehouse department. Management told Walton that he should train Michael for about 2 weeks and would thereafter be transferred to the transportation department. This transfer was decided on by Randall, with Neville's concurrence. Walton did train Michael for about 2 weeks, at the conclusion of which Michael was performing basically the same work which Walton had performed before Michael was hired.[77] Thereafter, management prepared a change-of-status form which stated that Walton was transferred to the transportation department effective August 11, 1980. The maintenance work which that department wanted consisted of the maintenance of Respondent's

[72] My findings as to this Payne-Werner conversation are based on Payne's testimony. Werner testified that Payne said he was concerned about whether he was implicated in the theft investigation, and Werner replied that Payne should not be concerned with the investigation, but should only be concerned with doing his job. In view of the inconsistencies in Werner's testimony as to a number of material matters (see *infra* at fn. 87), and for demeanor reasons, I credit Payne.

[73] This finding is based on the testimony of Payne, Morrison, and Werner on cross-examination. In view of Werner's retraction on cross-examination, I do not accept his testimony, as an adverse witness for the General Counsel, that Payne admitted removing company property.

[74] In fact, the departments are separated by a wall with several doors which were frequently unlocked.

[75] My findings as to this interview are based on a composite of Payne's testimony and credible parts of Morrison's and Werner's testimony. Because of the conflicts between Morrison's and Werner's testimony, the internal inconsistencies in Werner's testimony (*supra* at fn. 73), the evasiveness in his testimony (*infra* sec. II,D,1) regarding what Payne was accused of taking, and for demeanor reasons, as to this interview I accept Morrison's and Werner's testimony only to the extent that it is set forth in the text or corroborated by Payne.

[76] This finding is based on Werner's and Randall's testimony.

[77] This finding is based on Walton's testimony. For demeanor reasons, and in view of the probabilities of the situation, I do not accept Randall's testimony that between mid-July and early October Walton spent most of his time training Michael.

trailers, including the Thermal King refrigeration units in the trailers, and also some minor repair work on the tractors which Respondent leases from Ryder Truck Lines.

After August 11, Walton and Michael, with the approval of Transportation Manager Randall and Warehouse Supervisor Streilein, worked together. When maintenance work on trailers and tractors was needed, Walton went to do that; when maintenance work in the warehouse was needed, Michael went to do that. If this work was slack for either one, he would help out the other. Also, they would work together on occasional jobs which called for two men. Michael was capable of doing some Thermal King work, but Walton was substantially more skillful in such work. After breaking in Michael, Walton did about 20 percent of his work in the transportation department and about 80 percent in the warehouse.

When originally hired, Walton had been assigned to work 8 a.m. to 4 p.m., Monday through Friday, but was subject to emergency callout at any time, day or night. About the last 2 weeks in July 1980, both Walton and Michael began to work from 8 a.m. to 4 p.m., Tuesday through Friday, and from 7 a.m. to 3 p.m. on Saturday.

At all relevant times, Respondent had an agreement with Ryder Truck Lines, from which Respondent leased its trucks and which is open around the clock, to perform service work, on request, on Respondent's refrigerated trailers. Respondent sometimes (probably, usually) had such work performed by Ryder, sometimes by other shops, and on an emergency basis by Walton. On some occasions in July and August 1980, Respondent had to transfer loads between trailers because Ryder had been unable, for lack of parts or of knowledge about how Thermal King units worked, to repair a trailer which had already been loaded. However, Ryder objected to Respondent's having an auto mechanic work on a trailer, on the ground that this might invalidate the manufacturers' warranty on parts purchased and installed by Ryder. Randall and Werner both testified that they decided Walton would be capable of performing maintenance work on the tractors which Respondent rented from Ryder and on Respondent's refrigerated trailers, and that having him perform it would be cheaper than having it performed by Ryder. Randall testified that beginning about 6 weeks before Respondent moved Walton to the night shift effective October 14, 1980—that is, beginning about early September 1980—Randall and Neville discussed the question of which hours would constitute optimum coverage for maintaining the Thermal Kings and the trailers. Neville testified that before Walton's August 11 transfer into the transportation department, Neville suggested that if Walton were so transferred, he should be assigned to the second (3 p.m. to 11 p.m.) shift; but that in August or September, Neville and Randall never discussed changing Walton's hours.

On the morning of October 4, Randall told Walton that Werner wanted 7-day coverage for maintenance at the warehouse, and suggested that Walton and Michael work out a schedule between themselves. The two employees agreed to a schedule under which Walton would work Tuesday through Saturday and Michael would work Sunday through Thursday. They reported their agreed-upon schedule to Randall, who said that this would be acceptable to Werner.[78] When the employees were told of the 7-day coverage, nothing was said about working nights. Randall testified that the 7-day coverage was intended to cover the warehouse, and had nothing to do with the trailers.

As previously noted, Walton was one of the three employees who on October 2 arranged for the October 4 union meeting at the Holiday Inn, and were seen and hailed by Supervisor Streilein when they were leaving the Holiday Inn after making these arrangements. However, Walton did not attend the meeting on the morning of October 4, which was held on a day when he was regularly scheduled to work. His next scheduled workday was Tuesday, October 7. When he came to work that morning, he heard discussions among other employees regarding the discharge of some employees who were involved in the October 4 meeting. Later that morning, Supervisor Morrison asked Walton what was going on. Walton said that a lot of people had been fired for a lot of stupid reasons. Morrison replied, "it has to stop somewhere, the man cannot keep going like he is going."

That afternoon, Randall told Walton that Randall wanted to see him the next morning in Randall's office. Walton asked why. Randall said that Werner wanted Walton to work Tuesday through Friday nights and come in on Saturday during the day. Walton said that he did not object to working on the night shift, but that work on this shift would interfere with some classes he was taking on Tuesdays and Thursdays at the Northern Virginia Community College, and he thought it was too late to make a change in his class schedule. Walton said he would check on whether it was too late to change his schedule, and would let Randall know on the following morning. Walton suggested that on the 2 nights when a night shift conflicted with his classes, he could either make up his 8 hours by coming to work early or working late, or take time off without pay during the period he needed to attend school. Randall said that he would talk to Werner. Randall testified that he had known before informing Walton of his schedule change that he was attending classes at night, but had never warned him that he ought to take day classes in the fall. Transportation Supervisor Neville testified that, although he was unaware that Walton was attending night school in the summer, Neville knew that Walton had gone to night school in previous semesters.

Immediately after work that day, October 7, Walton went to Burrell's house and signed a union card. Later that evening, Walton consulted the college catalog for the fall quarter of 1980. The catalog showed that the courses whose evening sessions he had started to attend

[78] My finding that this conversation occurred on October 4 is based on Walton's testimony. Randall initially testified, as an adverse witness for the General Counsel, that this conversation occurred in July 1980, and later testified, as a witness for Respondent, that the employees went on 7-day coverage the week ending September 2 and the decision to go to such coverage was made the week before. In view of this inconsistency, Respondent's failure to bring in records to show the days on which Walton and Michael worked before October 4, and demeanor reasons, I accept Walton's October 4 date.

on Tuesdays and Thursdays also had day sessions scheduled for hours which would not conflict with his new work schedule. Further, the catalog stated that a student could withdraw from a course without grade penalty before November 6. However, the catalog also stated that October 3 was the last day for "late registration and add/drop" and for "full tuition refund." Walton had previously had to fill out an add/drop slip to change from one session to another session of the same course. He concluded from the foregoing that because it was after October 3, he could not change sessions, and could not withdraw from a course without having to repay to the Veterans Administration certain benefits which he had been receiving.[79] He did not talk to anyone at the school about the matter, and did not try to fill out an add/drop slip to change sections.

On the following morning, he told Randall that it was too late to change Walton's school schedule. Walton further said that if Respondent would "work with" him to finish out the current quarter (which he told Randall would amount to 3 or 4 weeks, but which in fact amounted to about 9 weeks), he would take day classes from then on. Randall said he would check into it.[80] Walton asked whether anything had been accomplished regarding a change in his new work schedule. Randall said that he had not yet talked to Werner about the matter, but would "get to him." Walton advised Randall that, if Walton punched out at 6 p.m. to go to school and punched in upon his return, the interval would be 4-1/2 to 5 hours including time for dinner. Walton again suggested that he either take the time off without pay, or put in 8 hours by coming in early or leaving late. Randall said that he would have to talk to Werner about the matter, and would do so as soon as he had a chance.

On Friday, October 10, Walton again spoke to Randall, who said that he had not yet talked to Werner but would be in on Saturday to talk to Werner and would give Walton a decision on Saturday. Walton said that he would check with Randall on Saturday. Walton came to work on Saturday, but Randall did not. Walton called Randall's house that afternoon to see if he were coming in. Mrs. Randall said that he had left and she thought he should be at work by this time.[81] Shortly before quitting time, Walton told Werner about the conflict between Walton's school schedule and his new work schedule, and said that Randall had planned on talking to Werner but had not yet had a chance to talk to him. Werner said that it was Randall's decision and that Walton had a problem.

On Monday, October 13, Walton called Randall at work. He said that Werner had said that the hours were set. Walton said, "in other words, [if] I punch out you are going to fire me." Randall said, "you can consider that." Walton said that he was not quitting, but did intend to attend school, and that he would see Randall on the following day.[82]

On the following day, October 14, before punching in, Walton talked to Randall, who said that this was not a laughing matter. Walton agreed. Randall said that an administrative decision had been made and there was nothing he could do about it. Walton said that he had made his decision and was standing by it. Randall said that he was not satisfied with Walton's work; that "it was his decision"; and that Randall was being paid to do a job, he had a job to do, and he was going to do it. Walton then punched in at 3 p.m., the starting hour for his new shift. At 6 p.m. he punched out (without telling his immediate supervisor, Neville), got cleaned up, ate supper, and went to school. He did not return to work that night.

Werner testified that Randall recommended that Walton be discharged for walking off the job, and that Werner (although he did not have to approve all discharges) approved Randall's recommendation. Werner did not testify that Randall gave any other reason for his alleged recommendation. Randall was not asked about the matter.

About 2:30 or 2:45 p.m. on October 15, Walton returned to the warehouse and found he did not have a timecard. He went to see Randall, who said "you made your decision. I had to make my decision . . . you are no longer employed, pack up your tools . . . if I was in your shoes I would have done the same thing."[83] Randall testified that Walton had told him that Walton was going to punch out early on October 14, and testified to the belief that Walton punched out early in order to attend class. At some time during this period, Walton told Randall that if Walton had to drop classes, he would have to repay to the VA the benefits he had been receiving.

Most of the trailer loading is performed during the second shift, and most of the problems which Respondent was having with Thermal King refrigeration units were being discovered after the trailers were in the loading process. A significant proportion of the mechanical problems in the tractors and trailers were being discovered when the drivers inspected their respective vehicles during the half-hour period immediately before they left on their runs. About 70 or 80 percent of the trucks leave between midnight and 4 or 5 a.m.; at least some of the rest leave about 2 p.m. Randall testified that the mainte-

[79] The tuition for the two courses being held on Tuesday and Thursday evenings was $57. He was also receiving "three-quarter pay" from the VA.

[80] My findings in these two sentences are based on Walton's testimony. For demeanor reasons, I do not accept Randall's denial.

[81] Randall ordinarily worked on Saturdays, but received his regular full salary even if he missed a particular Saturday.

[82] My findings in this paragraph are based on Walton's testimony. Randall testified that he did not recall Walton's telephoning him that day. To the extent this may constitute a denial, for demeanor reasons I credit Walton.

[83] My findings as to the Walton-Randall discussions are based on Walton's testimony, which is to some extent corroborated by Michael's credible testimony that on a date which he could not recall, Randall answered Walton's request for a shift adjustment to his classes by saying that Randall would have to discuss it with Werner. For demeanor reasons, I do not accept Randall's denial that he told Walton that Randall would check with Werner, or Randall's testimony that he said the decision about Walton's schedule was up to Randall, or Randall's testimony that he was not at the facility on October 14, or Randall's denial that he told Walton that Randall would have done the same thing if he had been in Walton's shoes. For demeanor reasons, and in view of the probabilities of the situation, I do not accept Randall's testimony that after failing to find Walton's timecard in the rack, Walton came into Randall's office and said, "I guess I've been fired," to which Randall gave no answer.

nance on the Thermal King units was generally done on the second and third shifts; and that, during the discussions which preceded Walton's transfer to the transportation department, Walton was told that he might have to work the second or third shift to do the maintenance on the trailers. As previously noted, Respondent insisted on Respondent's observing a 3 to 11 p.m. schedule (that is, the regular second-shift hours), and rejected both his proposal that on Tuesdays and Thursdays he work from 3 to 6 p.m. and 11 p.m. to 4 a.m. (that is, part of the second shift and part of the third) and his proposal that on those days he come in early.[84] Supervisor Neville, who was Walton's immediate superior but had no authority to change his work hours, testified that he did not learn about Walton's transfer to the second shift until about a week before it actually happened, on October 14. Neville further testified that the increase in business resulting from the M & M strike, which ended on September 20, diminished the time available for servicing the Thermal King units, thereby caused them to break down more frequently, and thereby led to a particular need by Respondent for a mechanic during the strike. Randall testified that the discontinuance of the extra work because the strike had ended would not have affected at all the decision to have a mechanic on the second shift.

Randall and Neville testified that after Walton said that his new hours conflicted with his schooling, Randall and Neville did not discuss whether Respondent could work around Walton's school schedule. Werner testified that "wherever possible," Respondent tries to arrange employees' work schedules around their personal needs. Between August and October 1980, with Warehouse Manager Streilein's permission, employee Zoretic punched in and punched out about 7 hours late every Thursday in order to attend night school. On September 23, 1980, Respondent granted employee Posey's request for a shift transfer in order to avoid conflicts between his work schedule and his duties as a member of the National Guard. In view of the foregoing, and for demeanor reasons, I do not believe Randall's testimony that he was not aware that Respondent had ever tried to work around hourly employees' personal commitments.

After Walton's separation, Respondent continued to have its tractors and trailers serviced by Ryder Truck. Michael continued to work the day shift he had worked before Walton's separation. Respondent never hired a mechanic to work on evening shift or to service its tractors and trailers, and made no effort to hire one. Werner testified, "Based upon the lack of success that we had with Mr. Walton's inability to perform while he was in the position, we have gone back to the old method of doing it."

Walton's personnel file contains a change-of-status form, signed by Randall with a typewritten date of October 16, which contains as the only specified reason for his separation, "Insubordination, refused to work assigned shift. Walked off the job . . . and failed to return to work." Also, his file contains an employee disciplinary report with checks before the entries "Insubordination" and "Defective and improper work." Under "Remarks" is the entry, "Refused to work assigned shift. Walked off job [on October 14] and failed to return. Also failed to complete job assignment in a reasonable time frame (equipment trailer)." This document contains Randall's signature with a typewritten date of October 15, and Werner's signature dated October 17. Neville testified that at the time of Walton's discharge, he had completed his early August assignment to the "equipment trailer" work, which consisted of reversing the doors of the drivers' lockers. Randall testified that Walton had never completed this job.[85] Randall testified that on one occasion, whose date he did not give, he spoke to Walton about his failure to finish the door job. Neville testified that he had spoken to Walton about this matter on several occasions, whose dates he did not give. Walton had never received any writeups about his work. Neville, who was Walton's immediate superior from mid-August 1980 until his October 1980 termination, but had limited opportunity to observe his work, testified that Walton's work "was good, for the most part. It was kind of slow, but the quality of the work was good." Randall, who was Walton's superior and Neville's immediate superior, testified that Walton was a valuable employee and a very skillful mechanic and Randall was generally pleased with his work.

### C. *The Allegedly Discriminatory Change in the Requirements Regarding Forms*

Respondent's Manassas facility serves only McDonald's restaurants. In the summer of 1979, some members of management from Respondent's Dallas facilities recommended that Respondent's Manassas pickers be required to use a "picker's log," similar to those used in Respondent's other warehouses which serve McDonald's. This document calls for the picker to insert his name, the date, the number of his pallet jack, and certain information regarding the pallet jack (the water level, the "wheels clear," the brake, the horn, lifting, lowering, and any defects). In addition, as to the order picked for each store, the document calls for the picker to enter the store number, the route and stop, the total cases, the number of "frozen" cases, the number of "dry" cases, the "drop stock," the number of pallets, the start time, and the finish time. Also, the document calls for an explanation for any problems which resulted in "low C.P.H." (inferentially, cases per hour).[86] The pickers regarded the use of this form as a nuisance, particularly (because some had no watches) the requirement for noting the start time and finish time. By 1980, the use of the "picker's log" forms had been abandoned at the Manassas fa-

[84] As previously noted, 3 days before Walton was advised of his new shift, he and Michael had agreed to a schedule under which Michael (but not Walton) would work on Sundays and Mondays. The record indicates that Walton's services in connection with the trucks and trailers were needed on Mondays as much as on Tuesdays and Thursdays, and would be more useful to Respondent on Sundays (when drivers pick up loads preparatory to delivery) than on Saturdays (when they do not). However, so far as the record shows, neither Respondent nor Walton ever suggested a second change in the days Walton was scheduled to work.

[85] Walton's testimony indicates that he may have been performing this job just before clocking out on his last day of work, October 14.

[86] The form was also used by the receivers, who were to enter the vendor, the total number of cases received, the time the receiver started, and the time he finished.

cility, although some of the forms themselves remained in the warehouse. Thereafter, and until October 6, the pickers used a form ("Order Picking, Checking, Loading Schedule") which merely required each picker to insert his initials to signify his commitment to picking for particular stops, and another set of initials to signify that he had done so.

Werner testified that on October 1, during the center-managers' Quebec meeting, the "picker's log" form was referred to during the presentation of another center manager. Werner further testified that "It was operating policy to use [that form] in every [McDonald's] distribution center," and that Respondent's other distribution centers which exclusively serve McDonald's use that form at Kowalski's "direction." Werner did not attach a date to this "direction."

Werner returned from Quebec late Friday evening, October 3, and the union meeting was held on October 4. On Monday, October 6, the pickers were instructed to resume using the "picker's log." Employee Zoretic, who received these instructions and had been hired after the use of these forms had been abandoned, credibly testified that using them "would kind of slow you down a bit." As previously noted, Werner began Heskett's discharge interview, about 11 p.m. that day, by commenting that Werner had heard that Heskett had some complaints about the new picking system. As of the March 1981 hearing, the pickers were still being required to fill in both the "Order Picking, Checking, Loading Schedule" and the picker's log. Werner testified that the instructions to use the log were issued in order to initiate a level of consistency with all of the McDonald's distribution centers, and that Respondent wanted the form to be used in order to get a better handle on the time situation to complete the assigned work. Respondent's brief points to employee Zoretic's credible testimony that informal records kept by some employees before reinstitution of the "picker's log" enabled the leadmen to assign the bigger routes to the faster pickers. Werner's just-cited testimony aside, no member of management testified that such considerations entered into the decision to reinstate the "picker's log."

### D. *Analysis and Conclusions*[87]

#### 1. The alleged discriminatory discharges

About September 29, 1980, Respondent's warehousemen began to discuss unionization among themselves; some of this activity was observed by Supervisor Morrison. On October 2, when three of Respondent's employees (Burrell, Payne, and Walton) went to the Holiday Inn to arrange for an October 4 union meeting, Supervisor Streilein saw them leaving the motel. At the union meeting on the morning of October 4, a number of Respondent's 36-unit employees signed union cards. Supervisors Randall and Streilein learned on October 4 and 5, respectively, that a union meeting had been held at the Holiday Inn on October 4, and so advised Center Manager Werner on Monday, October 6. At 8 or 9 a.m. on October 6, Streilein told Burrell that Streilein knew all about the Holiday Inn meeting and about the cards being signed. On October 7, Werner told employee Payne that Werner already knew about "all your meetings." Between October 6 and 9, Respondent discharged six (Cummings, Jolley, Burrell, Heskett, Posey, and Payne)[88] of the employees who had signed union cards at the October 4 meeting and are named in the complaint; demoted and then discharged a seventh employee, Lohman, who had also signed a union card at the October 4 meeting; and discharged an eighth employee, Zoretic, who had not attended the meeting or signed a card but, after revealing knowledge of the meeting to Supervisor Morrison, had answered Morrison's questions about the union drive by untruthfully disclaiming knowledge of the meeting's location and what had happened there. When Burrell commented during his discharge interview that he was receiving a poor return for being "loyal" to Respondent, Werner hollered "loyal," threw a dictionary at Burrell, and told him to look up the word. About October 11, after employee Reid in Werner's presence had expressed apprehension about keeping his job, Werner procured from Reid, who had signed a union card on October 4, the representation that his absence from the October 4 union meeting was due to a belief that it was not in his "best interest," and then extolled Reid as an "outstanding" man and an "angel." About 2 days later, on October 15, Respondent discharged the remaining employee (Walton) who had arranged for the October 4 meeting. Ten days later, during an employee meeting convened by Respondent, Werner said that he wanted to try to "indoctrinate" the new employees who had been hired to replace certain other employees. Then, he said that he wanted to make sure everybody got out to a good sound start, that certain employees had taken it upon themselves to attend meetings that were not held or authorized by him, and that any person taking part in any such meetings would be dealt with in a similar manner.

The foregoing sequence of events strongly supports the General Counsel's contention that the October 6 to 15 discharges attacked in the complaint were motivated by the dischargees' union activity. This inference is sup-

[87] In making my factual findings, I have frequently rejected Werner's testimony where contradicted by other witnesses. In connection with such credibility findings, I note that Werner repeatedly gave self-contradictory testimony as to a number of matters, including matters which he must have known were highly material to the issues presented. By way of example only, Werner gave self-contradictory testimony as to whether he knew about union activity before the allegedly discriminatory discharges; whether theft was admitted by alleged discriminatee Payne during the separation interview where he was given a choice of being terminated for interview, where he was given a choice of being terminated for suspected theft or resigning; whether employees are automatically discharged upon receiving a third warning as did alleged discriminatees Cummings and Jolley, the identity of the supervisor toward whom alleged discriminatee Zoretic's alleged insubordination allegedly caused his discharge; and whether employees had legitimate work-related uses for the towels for whose alleged misuse alleged discriminatees Lohman and Heskett were allegedly discharged. See also *supra*, fns. 16, 33, 34, 62, 64, 71, ". . . in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949).

[88] Respondent's contention that Payne was not discharged is rejected for reasons discussed *infra*.

ported by the evidence that the lawful reasons which Respondent tenders therefor were not the real reasons.

Thus, Respondent contends that Zoretic was discharged on October 6 for insubordination. However, Zoretic was not so advised when he was discharged or on the following day, and Respondent did not so advise the Virginia unemployment compensation authorities on October 22. Further, although Werner initially testified to being told that Zoretic was discharged for insubordination to Hougham, Hougham denied that such insubordination had occurred or that he had so alleged to Morrison. Morrison, in turn, initially testified that Zoretic had been insubordinate to him when given instructions by a supervisor other than Morrison, and then was unable to remember what Zoretic said which was insubordinate, or when he said it, or whether he was insubordinate before the interview to which Morrison called him with the intention of terminating him. The day after Zoretic's discharge Werner gave Zoretic as the only reason for his discharge his having allegedly destroyed or ruined the pallet jack; but the pallet jack was in fact operative at all material times, and, prior to the union meeting, Respondent prepared a disciplinary notice which merely stated that the next incident of the same nature as defacing the pallet jack would merely result in a 3-day suspension.

Further, Cummings' credible testimony shows that the rack damage in connection with which he was allegedly discharged had been effected many weeks previously.[89] However, even assuming with Respondent that the damage to the leg was aggravated on October 6, Respondent has not really explained its action in discharging Cummings. Cummings told Streilein that Cummings had not damaged the rack; Respondent admittedly did not have any evidence otherwise; the writeup of Cummings in connection with his incident was on its face based on the assertion that he was one of only three employees who could have damaged the rack; racks do get bumped from time to time in a day's work; Cummings had been working for Respondent since the opening of the facility; in discharging Cummings, Streilein said that he was just doing what he was told; and he did not explain why Respondent regarded this particular third warning (admittedly based merely on the possibility that Cummings may have accidentally damaged the rack) as calling for Cummings' discharge rather than the exercise of management's discretion to withhold such action.

The record also impeaches Respondent's contention that Jolley received his third writeup (and, because it was his third, was discharged) on October 8 because he pushed corrosives across the floor on October 5. Thus, when Werner saw him pushing corrosives, Werner initially merely told him never to do this and instructed him to pick them up, instructions which Jolley respectfully obeyed. Jolley credibly testified that nobody mentioned the incident to him again until his October 8 discharge (see *infra* at fn. 90). As to management's discussions between this incident and Jolley's discharge 3 days later, management witnesses were unable to agree among themselves about whether Streilein investigated the incident by talking with Jolley;[90] whether Jolley's alleged pushing of corrosives in Hougham's presence was reported by Hougham to Streilein before or after Jolley's discharge, whether Hougham reported this incident to Werner before Jolley's discharge; whether Hougham was consulted about Jolley's discharge;[91] and whether Jolley's discipline was decided on by Werner or by Streilein. Moreover, other employees and at least one supervisor had pushed corrosives, on occasion in the presence of Werner or other members of management, and Jolley himself had frequently pushed corrosives on earlier occasions, but Jolley's October 8 writeup was the only written discipline ever issued to any employee for such conduct.

Likewise pretextuous are Respondent's explanations for discharging mechanic Walton. Respondent relies mostly on Walton's action, after reporting to work on the initial date and at the hour called for by his transfer to the night shift, in punching out to attend his night classes. However, Walton had previously made a number of proposals to Respondent for an accommodation, for 2 days a week until the end of the current semester, between his newly assigned working hours and his classroom schedule. Although Respondent ordinarily tries to arrange employees' work schedules around their personal needs, Werner told Walton the matter was up to Randall and Randall told Walton that Werner had refused to change Walton's hours. Although Respondent contends that it failed to adjust Walton's hours because his Thermal King work was particularly needed during the hours worked by the shift to which he was transferred, among the accommodations proposed by Walton were schedules which for purposes of much of the Thermal King work were better than his new shift hours. Furthermore, the sincerity of Respondent's contention that it needed Walton's Thermal King services 4 nights a week instead of 2, and immediately rather than at the end of the semester, is rendered questionable by the fact that after Walton's discharge, Respondent continued its prior practice of having Thermal King work done by Ryder Truck, and did not even try to find an employee with Walton's Thermal King capabilities. Respondent's brief relies on the testimony of the college registrar that on the date when Respondent advised Walton of his new shift, he could have changed to day classes without charge if he had obtained the signatures of the instructor, the department head, and the provost; and points out that Walton made no effort to obtain such signatures. However, there

[89] I credit Cummings' testimony in this respect in view of Streilein's testimony that the leg had been in a dented condition since at least April 1980 and his and Werner's failure to explain why (as alleged by Streilein) it was decided on October 6, 1980, before someone on duty on October 6 allegedly damaged it further and the day before Cummings' discharge, to have the leg repaired.

[90] In view of this conflict, and for demeanor reasons, I accept Jolley's testimony that the matter was not mentioned to him between October 5 and 8.

[91] In view of these conflicts, and for demeanor reasons, I accept Jolley's denial that Hougham spoke to him a few days before his discharge about pushing corrosives. Rather, I accept Jolley's testimony that before Werner's October 5 reproof, nobody had ever told him not to push corrosives, and that his only instructions regarding methods of loading corrosives were not to crush them by pinning them between the pallett jack and something else.

is no evidence that Respondent was aware of this possibility when it refused Walton's request regarding his schedule. Rather, Walton credibly testified that so far as he knew management made no effort to find out whether he was correct in saying that it was too late for him to change his schedule, and the record indicates that Respondent accepted Walton's representations in this respect. Moreover, the record indicates that Respondent changed Walton's hours for the specific purpose of causing him to refuse to work those hours because they conflicted with his class schedule and thereby to provide a pretext for discharging him. Respondent's asserted need for his services on its tractors and trailers had diminished with the September 20 end of the M & M strike; Respondent changed his days off (to provide 7-day warehouse coverage, and for reasons unrelated to servicing tractors and trailers) 3 days before telling him that his shift was to be changed too; Respondent had good reason to anticipate that a night-shift schedule would conflict with Walton's class schedule; his immediate supervisor had only about the same notice of the change that Walton did; and after Walton's discharge, allegedly because until the end of the semester he would not work during part of the regular second end of the semester he would not work during part of the regular second shift for 2 days a week, Respondent never even tried to replace him, but instead continued to have its tractors and trailers serviced by Ryder Truck.[92] Respondent also relies upon Walton's failure (according to Randall but not Neville) to complete before his October 15 discharge his early August assignment of reversing the doors in the equipment trailer. However, Walton's work performance was not mentioned to him when he punched out on October 15 or, so far as the record shows, at any time thereafter; it was not mentioned in his change-of-status form (although it was mentioned in his employee disciplinary report); Neville testified that Walton's work was of good quality although "kind of slow"; Randall testified that Walton was a valuable employee; and before his discharge, he never received any writeups.

Respondent's contention that Lohman was demoted from his leadman's job because of poor loading for which Lohman was responsible and because of his failure to keep the dock clean is undermined by Werner's concomitant action in offering Lohman a supervisory job (which would have excluded him from the bargaining unit) on another shift; by the conflict in testimony between Werner and Hougham about who initiated the demotion decision; by Werner's failure to tell Lohman, at the time of the loading incident, that he would be written up or that his leadman's job was in jeopardy; by Werner's rejection, at the time of the incident, of Lohman's suggestion that the loading problem be drawn to the whole crew's attention; and by Respondent's failure to warn Lohman about the housekeeping problem or to mention it in the disciplinary report which sets forth the demotion. Respondent's contention that Lohman was discharged for taking home cloth towels, which he took home to launder and thereafter brought back to the warehouse to again use as sweat towels and handkerchiefs, is belied by the fact that throughout Lohman's 14-month tenure with Respondent, during the last 4 months of which he served as leadman, he had been leaving and coming back to the plant with a towel tied to his belt, without any written or even oral reproof from management. Indeed, Laymon advised management during the September 10 interview that Lohman was the only honest man in the warehouse, and Werner starred Kowalski's note of that remark. Respondent's contention that Lohman was discharged for lawful reasons is further impeached by the conflicts and internal inconsistencies in the testimony of Respondent's witnesses regarding the sequence of events surrounding his discharge.

Respondent contends that it discharged Burrell, Posey, and Heskett in early October because it suspected that they had been stealing from Respondent. During the Kowalski-Carter interviews on September 10 and 11, these three employees and Payne had been accused of stealing. Moreover, Werner testified that in January 1980 he had announced a policy that removal of company property was grounds for "immediate" dismissal. However, Respondent did not even include Burrell or Payne in these September interviews, concluded Posey's September interview by telling him that he had been doing a fine job, and concluded Heskett's September interview by asking for suggestions about how to control theft at the plant and requesting him to advise Respondent if he saw anyone taking anything. A few days later, Werner told Payne that he was not going to be discharged, ". . . you're honest, you're obviously a good employee and so [is] Gary Burrell. Y'all done real good work for me." Also, on September 16, Werner included the names of these four employees, among others, in a list of employees to be admitted to Respondent's premises, and named the employees previously discharged for suspected theft as among those to be excluded. About the same time, and notwithstanding employee E's allegations during the September 10–11 interviews that Burrell had remarked that stealing on the third shift is particularly easy, Werner reiterated to Burrell Werner's previous offer to him of a supervisory job on that shift. Similarly, on September 23, Respondent granted Posey's request for a transfer from the second to the third shift. Werner conceded that between the September 10–11 interviews and the October 6–8 separations of these four employees, he obtained no additional information tending to implicate them; and during the separation interviews, all these employees denied taking anything. Indeed, during the first discharge interview, involving Burrell on October 6, Werner once again offered Burrell a supervisory job on the very shift where Burrell had allegedly said stealing was particularly easy; and did not accuse him of theft until after Burrell's action (somewhat inconsistent with Respondent's alleged suspicions) in refusing the job,

[92] As to the legality of Walton's discharge, the issue is Respondent's motives, and not whether Walton was reasonable in concluding that he could not change his class schedule without financial penalty. In any event, his conclusion was warranted by the school catalog, and his failure to press the matter further between the evening of Monday, October 7, and the afternoon of Tuesday, October 14, when his new shift assignment became effective, does not indicate less than good faith on his part. The record fails to show whether he could have obtained the necessary three signatures if he had learned about and asked for them. Cf. *John Dory Boat Works, Inc.*, 229 NLRB 844, 850–851 (1977).

which would have excluded him from the bargaining unit.

Respondent contends that Payne voluntarily resigned. However, the credited evidence shows that he signed a resignation only after Werner told him that if he did so, he would receive a good reference, but if he did not, he would be discharged on the stated ground of suspected theft. Under these circumstances, I find that he was discharged. *Marriott In-Flite Services Inc. a Division of Marriott Corporation*, 224 NLRB 128 (1976); *RJR Communications, Inc.*, 248 NLRB 920, 936–937 (1980); *Everspray Enterprises, Inc.*, 235 NLRB 120, 123 (1978); *Daniel Construction Company, a Division of Daniel International Corporation*, 244 NLRB 704, fn. 2 (1979). Respondent's contention that in any event suspected theft would have been the real reason for his discharge is rejected because Werner admittedly told the Board investigator of the October 1980 charge that Respondent would have liked to keep Payne as he was the leadman on the first shift and one of the most senior employees of the warehouse; because during the discharge interview Werner at least by implication offered Payne a supervisory job, which would have excluded him from the bargaining unit; because Werner had told Payne, after the September 10–11 interviews and about 3 weeks before he signed a union card, that he was an honest and good employee who would not be fired; because Payne had not been included in the September interviews; and for the reasons set forth in connection with Burrell, Posey, and Heskett. I note, moreover, that Werner initially testified that on September 11 employee E had identified Payne as having removed "cheese and other produce items" (Kowalski's and Carter's notes specified cheese only); then testified that employee E had accused Payne of taking cheese; then, when asked whether Werner had also accused Payne of taking produce, replied that cheese was considered a produce item; then, when asked whether Werner said produce, testified, "I think I said cheese"; and when asked whether he said just cheese, or cheese and other produce, replied, "I may have said cheese and other produce."

In contending that theft or suspected theft was the real reason for the terminations of Lohman, Burrell, Posey, Haskett, and (in a sense) Payne, Respondent contends (Resp. br., p. 7) that during the September 30-October 3 center managers' meeting, "Management directed Werner to terminate all people who had been involved in the theft of Company property and take them off the rolls as soon as he returned to the distribution center . . . Werner was instructed to fire anyone who had removed any company property . . . . Anyone who had been implicated was to be terminated . . . . *They were*!" As to management conversations at the Quebec meeting, Respondent produced only Werner's testimony. Moreover, although Respondent's brief accurately summarizes Werner's testimony for Respondent on cross-examination at one point, Werner thereafter testified that Kowalski told him "to proceed on the information that we had, to bring the people into the office, to discuss with them the information that was available, to hear what they had to say then to act"; and previously testified that Siebert and Kowalski "indicated that with the evidence at hand and the investigation to that point . . . we should proceed as soon as I could arrange it to finish the investigation and separate the implicated employees."[93] Further, as to these four employees, Werner's actual conduct is inconsistent with the description of his instructions as set forth in Respondent's brief. Thus, Werner began the termination interviews of Burrell and Payne, not by accusing them of theft, but by unsuccessfully offering them supervisory jobs which would exclude them from the unit. In addition, although Werner visited the plant on October 4 (the day of the union meeting, and the day after his return from the Quebec conference) and 5, Heskett was permitted to work a full shift on October 5 and almost a full shift on October 6 before being discharged, Payne was permitted to work a full shift on October 6 and part of a shift on October 7, Burrell was specifically directed to finish his October 6 shift before proceeding to the discharge interview, and Lohman was permitted to work for 11 hours after bringing in the towels for whose removal he was allegedly discharged. Also, Werner's testimony regarding his alleged instructions during the Quebec meeting raises unanswered questions regarding management's motives for the discharges at issue here. Respondent's failure to include these five employees among those discharged during or a few days after the September 10–11 theft interviews strongly suggests that management (including Kowalski) did not believe the accusations made against all of them but Lohman, did believe Laymon's statement during the interviews that Lohman was honest, and did believe the denials of theft advanced by Posey and Heskett, both of whom were interviewed at that time. In this connection, I note that these accusations were made by workers who were admitted thieves and were allegedly (and in some cases admitted) drugs users and "pushers." Further evidence that management did not in mid-September believe the theft allegations against Posey and Heskett is provided by the failure of management (including Kowalski) to ask employee Laymon to include in his written statement his oral allegations that the towels taken by Heskett numbered in the "thousands" (a statement whose untruth Laymon testimonially admitted) and that Posey had obtained, or at least asked for, Pittsburgh Steelers glasses, and perhaps certain kinds of produce. However, Werner did not give any testimonial explanation for Kowalski's alleged decision, almost 3 weeks later, that these employees were (or may have been) guilty and should (or should perhaps) be discharged. In fact, Werner's testimony vacillated as to whether he consulted Kowalski before discharging Posey, and as to whether he was discharged partly for awareness of theft by others (although it was his report to management which initiated the series of events leading to Spitler's apprehension).

Finally, Respondent points to the fact that several other employees who had been accused in August by Spitler and on September 10–11 of theft but were still on

[93] Rather similarly, as a witness for the General Counsel, Werner testified that management interviewed all employees who had been identified by other employees as removing company property, and that he tells "most people that take [company] merchandise" that they will be terminated.

the payroll as of October 5 were separated therefrom by October 8. More specifically, employee B was discharged on suspicion of theft; employee F resigned on October 7, for reasons not shown by the record, after being told that Werner would interview him later in the day; and employee I resigned, according to his testimony, "so I wouldn't get fired."[94] Respondent contends that after these three terminations and the terminations of Burrell, Posey, Heskett, and Payne, all those implicated in August by Spitler or on September 10–11 were terminated. However, as of the March 1981 hearing, employee D (accused on September 10–11 of stealing a good deal of merchandise) was still on the payroll. Werner testified that employee D was on workmen's compensation and "by law, must be carried on payroll" until he went off workmen's compensation, at which time, he would be discharged. There is no evidence whatever as to the date of Werner's alleged decision to discharge employee D, and Respondent cites no basis (nor have I been able to find any) for Werner's assertion that while on workmen's compensation, employee D could not lawfully be discharged for stealing while an active employee. In any event, the October 6 discharge of employee B for suspected theft, and the resignations that same day (one of them to avoid discharge) of two other employees so accused in August by Spitler or on September 10–11, do not establish that the discharges during this same period of others previously accused of theft were so motivated. In this connection, I note that Werner did not testify that he intended to discharge employees F and I for suspected theft; that the record fails to show the content of Respondent's October 6 termination interview with employee B (for example, unlike the employees named in the complaint, he may have confessed to theft); and that B, unlike most of the employees named in the complaint, had been accused of using "dope."

For the foregoing reasons, I find that Respondent demoted employee Lohman, and discharged employees Lohman, Zoretic, Cummings, Jolley, Burrell, Posey, Heskett, Payne, and Walton, to discourage union activity, in violation of Section 8(a)(3) and (1) of the Act.[95]

### 2. Alleged independent 8(a)(1) violations

I agree with the General Counsel that Respondent violated Section 8(a)(1) of the Act when on October 25, after Respondent had discharged a number of employees for attending the October 4 union meeting, Werner threatened the current employees with discharge for further union activity by stating that he wanted to "indoctrinate" former employees' replacements, observing that certain employees had attended meetings not held or authorized by him, and going on to say that anyone taking part in such meetings would be dealt with in a similar manner. Further, I agree with the General Counsel that Respondent gave the employees the impression of surveillance, in violation of Section 8(a)(1), when on October 6 Supervisor Streilein replied to employee Burrell's statement that the employees had had a meeting at the Holiday Inn by telling him that Streilein knew all about that meeting and about the union cards being signed; and when on October 7, after extracting from employee Payne the admission that the employees had had a union meeting the preceding weekend, Werner said that he already knew about "all your meetings." *15 East 48th Restaurant Inc. d/b/a Sagapo Restaurant and Sagapo Restaurant, Inc.*, 257 NLRB 1212, 1215, fn. 14 (1981). Also, I find that Respondent violated Section 8(a)(1) during this same conversation about the union meeting when Werner went on to solicit grievances from Payne (with the implication that they would be favorably received) by asking why Payne had not come to him if Payne wanted somebody to talk to. *N.L.R.B.* v. *Tom Wood Pontiac, Inc.*, 447 F.2d 383, 384–385 (7th Cir. 1971); *Arrow Molded Plastics, Inc.*, 243 NLRB 1211 (1979), enfd. in relevant part 653 F.2d 280 (6th Cir. 1981); *Litton Mellonics Systems Division, a Division of Litton Systems, Inc.*, 258 NLRB 623, 636 (1981).

In addition, I find that Respondent engaged in unlawful interrogation, in violation of Section 8(a)(1), when during this same conversation Werner asked Payne (who on the preceding Thursday had been seen by Supervisor Streilein leaving the Holiday Inn after renting a room for the union meeting) where he had been the preceding Thursday; when on October 5 Werner asked employee Posey, 2 days before discharging him for union activity, whether he really thought "this" (inferentially, the Union) would "get off the ground"; and when on October 2 Supervisor Morrison asked Zoretic if he knew "where the Union was at." In finding the foregoing interrogation to be unlawful, I note Respondent's opposition to the Union; its October 6 to 15 discharges of nine employees (including all of those subjected to allegedly unlawful interrogation) for union activity, including the activity of seven of them in attending the meeting which management inquired about; Werner's threat to discharge new employees who attended union meetings; the absence of assurances by Werner against reprisal or any demonstrated legitimate purpose for the questioning, some of which asked for information which Respondent already possesses; Payne's and Zoretic's untruthful replies; Posey's failure to reply at all; and Werner's status as Respondent's top-ranking full-time official at the Manassas facility.[96]

### 3. Allegedly discriminatory change in requirements regarding forms

The December 1980 complaint alleges, *inter alia*, that Respondent discriminated against its employees in changing their working conditions by requiring them to fill out a new form when they picked orders, all because of their

[94] Employees F and I signed union cards before October 6, and all three were named in the first charge filed herein. The charge was dismissed as to employees F and I. Employee B's name was deleted from the complaint pursuant to the unopposed motion of counsel for the General Counsel. As to employee I, I need not and do not resolve, as between him and Werner, the question of whether employee I had refused to come to the office to discuss his alleged "involvement" in theft.

[95] Whether Lohman, Payne, Posey, Burrell, or Heskett engaged in dishonest conduct which would disqualify them from affirmative relief is discussed *infra* under "The Remedy."

[96] The G. C. br. (p. 48, fn. 47) attaches to each 8(a)(1) paragraph of the complaint an incident allegedly encompassed thereby. The incidents so recited do not include Zoretic's October 5 conversation with Morrison or Reid's conversation with Werner about October 11.

union activity. This allegation is not discussed in the General Counsel's brief. So far as I can see, the only evidence supporting this allegation is Werner's taunting reference thereto at the start of the interview when Heskett was discharged for union activity, the fact that the employees had disliked the forms when they had been required previously, and the fact that the requirement was reimposed on the Monday following the union meeting on Saturday, October 4. However, that Monday was also the Monday following Werner's return from the Quebec meeting, and I perceive no basis for questioning his testimony that the form was referred to during that meeting. I accept Werner's testimony that use of that form in McDonald's distribution centers is Respondent's operating policy, and that the instructions to use that form were issued for the purpose of conforming with that policy and to "get a better handle on the time situation."

## CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by threatening employees with discharge for union activity, giving employees the impression of surveillance over union activity, soliciting employees to take grievances to management rather than attempt to obtain redress through organizing a union, and interrogating employees regarding union activity.

4. Respondent has violated Section 8(a)(3) and (1) of the Act by demoting and discharging Robert Ivar Lohman, and by discharging Ernest Richard Zoretic, Ross Alexander Cummings, Paul Bryant Jolley, Jr., Gary William Burrell, William Leo Heskett, Philip Isaac Posey, Charles Franklin Payne, and Kenneth Ray Walton, in each case to discourage union activity.

5. The foregoing unfair labor practices affect commerce within the meaning of the Act.

6. A unit of all warehousemen and forklift operators employed by Respondent at its Manassas, Virginia, location, excluding all office clerical employees, truckdrivers, receiving clerks, shipping clerks, guards, and supervisors as defined in the Act, is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

7. Respondent has not refused to bargain with the Union, or discriminated with respect to requiring use of forms, in violation of the Act.

## THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom. Because Respondent has committed a number of serious violations of the Act through (*inter alia*) the top-ranking official at its Manassas distribution center, including nine discharges for union activity (eight of them within a 36-employee unit) and a threat by him (at a management-convened employee meeting) to take like action against employees who engage in union activity in the future, I conclude that unless restrained, Respondent is likely to engage in continuing and varying unlawful efforts in the future to prevent its employees from engaging in union and protected concerted activity. Accordingly, Respondent will be required to refrain from in any other manner infringing on employees' right to engage in such activity. *N.L.R.B.* v. *Express Publishing Company*, 312 U.S. 426, 437–439 (1941); *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941); *N.L.R.B.* v. *Southern Transport, Inc.*, 343 F.2d 558, 561 (8th Cir. 1965); *N.L.R.B.* v. *East Texas Pulp & Paper Company*, 346 F.2d 686, 689–690 (5th Cir. 1965); *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Respondent contends in its brief that should I find (as I have) that Jolley was discharged because of his union activity, a reinstatement/backpay order would nonetheless be inappropriate as to him because of his conduct immediately following his discharge interview. In finding what Jolley did on that occasion, I rely on his testimony, which was not contradicted by either Streilein or Werner, rather than on Streilein's entries in Jolley's personnel folder. Such credited testimony shows that immediately upon being told of his discharge, Jolley cursed Werner; and that after leaving Werner's office and reaching the company parking lot, Jolley turned around, reentered the warehouse, ran up the stairs to Werner's office, tried to turn the knob to the door but found it was locked, may have banged it once, called that Werner had better lock the door, and then returned to Mrs. Jolley in the car. After returning home, Jolley telephoned Werner and apologized for Jolley's conduct. The credible testimony shows that Jolley was angry because he thought he had been treated unfairly. Further, I have found that Respondent had failed to mention to Jolley for 3 days the October 5 corrosive-pushing incident which Respondent tendered to Jolley as the reason for his October 8 discharge, that this was the only time Jolley had ever been told not to push corrosives, that to Jolley's knowledge others had done this without reproof, and that the real reason for his discharge was his union activity. Moreover, just before being discharged, the 18-year-old Jolley had learned that the twins whose birth the Jolleys had anticipated were both dead; he had not been to bed since at least the 11 p.m. beginning of his shift the previous day, about 16 hours before his discharge; and at 4 p.m. the previous day he had received a telephoned request from his supervisor requesting him to perform for Respondent, after the conclusion of his forthcoming 8-hour shift, an unpaid errand which required a 100-mile drive in his own truck and using his own gasoline. Further, after performing this errand he had driven his wife about 30 miles and had waited around while repeated examinations of his wife were revealing the death of their babies. I conclude that under all the circumstances, Jolley's postdischarge conduct does not disqualify him from affirmative relief. See *N.L.R.B.* v. *M & B Headwear Co., Inc.*, 349 F.2d 170, 174 (4th Cir. 1965).

Respondent does not in terms contend that as to the employees assertedly discharged for dishonesty, what they in fact did disqualifies them for affirmative relief should I find (as I have) that the dishonesty claim was a pretext. The nature of the misconduct attributed to these

employees suggests that I should consider that issue, *sua sponte*, although Respondent's failure to raise the issue detracts from the weight to be attached to any misconduct in which they may have been engaged.

1. The only evidence that employee *Lohman* took anything belonging to Respondent is the undisputed testimony that he removed about seven cloth towels from a carton made available to the employees by his immediate supervisor; thereafter used them solely to wipe his forehead and glasses, and blow his nose, on the job; and after new towels were no longer being made available to employees, openly took home the already acquired towels for the sole purpose of laundering them and then openly took them back. Further, on Respondent's request he returned to Respondent all the towels he could find. I perceive no misconduct whatever by Lohman.

2. The only evidence that employee *Payne* ever took anything from Respondent is the accusation by employee E, discharged for suspected theft and drug use, that Payne took some cheese out in his lunchbox and (perhaps) that he took other produce items. I believe that Payne was truthful in denying Respondent's accusations of theft.

3. *Posey* openly removed from the premises some greasy towels which he found in the dumpster and which, therefore, he had every reason to infer had been discarded. Such towels were unsalable; when he told Respondent about the incident he was initially told that he was doing a fine job; and Respondent never asked him to return or pay for them. As to this incident, I perceive no misconduct whatever by Posey. Former employee Laymon, an admitted thief who when testifying was aware that whether he was to be prosecuted was as a practical matter within Respondent's discretion, testified that Posey removed a 72-glass case of Pittsburgh Steelers glasses from the "dry" warehouse to the freezer (where both of them worked) and asked Laymon to take the case to his own home in order to enable Posey to buy from Laymon the glasses featuring a particular Steeler, Terry Bradshaw. Still according to Laymon, he took home the case of glasses, but Posey never picked up the allegedly desired glasses. Laymon misdescribed the glasses,[97] there is no evidence that the two employees were ever particularly friendly, and Laymon's testimony at least arguably spread the blame for the admitted continued presence of the glasses in Laymon's own home. I credit Posey's testimony that he roots for the Washington Redskins, which to some extent is corroborated by the fact that he resides in the Washington metropolitan area and was not shown to have any Pittsburgh connections. It is rather unlikely that he participated in a 72-glass theft in order to be able to buy 18 glasses, which he never obtained, portraying a Pittsburgh player. As discussed *infra*, Laymon's representations to management regarding the misconduct of other employees were admittedly exaggerated or inaccurate. I credit Posey's denial of the glass incident. Management's notes of the September 10 Laymon interview at least arguably state that Laymon accused Posey of taking other products. Laymon testified that he did not remember whether he made these accusations, or whether Posey engaged in such conduct. I conclude that Posey was truthful in denying Respondent's accusations of theft. In short, the credible evidence fails to establish any misconduct by Posey.

4. During the September 10–11 interviews, company personnel who were themselves admitted thieves accused *Heskett* of having taken a Frisbee, cheese, jelly, and cookies. There is no direct evidence that Heskett ever took any of these items. I accept his denials of this hearsay testimony.

During the September 10 interview, Laymon told management that Heskett had taken some McDonald's corporate flags from the warehouse.[98] Laymon testified for Respondent that about October or November 1979, Heskett had said he had a large number of flags in his room (inferentially referring to McDonald flags), Laymon asked if it was possible for him to get one, and Heskett replied that all he had to do was walk out with it. Laymon did not testify that he had seen Heskett remove flags from the premises.[99] As a witness for the General Counsel, Werner testified that during Heskett's September interview, he "possibly" admitted taking American flags.[100] Later, as a witness for Respondent, Werner testified without corroboration that Laymon said he had obtained a McDonald flag from Heskett, and that Laymon returned the flag by registered mail. During Heskett's January 1980 unemployment compensation hearing, Werner testified that "a flag" had been removed from the premises by Heskett. At the unemployment compensation hearing, Heskett did not testify about flag removal. He admittedly possessed a collection of corporate flags, which he had begun about 1967, and admittedly possessed a McDonald flag, at least at one time. He testified in February 1981 that it had been some years since he last requested a flag for his collection, but variously gave dates 1967–68 and 1973. Notwithstanding this inconsistency in Heskett's testimony, I accept his denials that he removed flags from Respondent's warehouse. In this connection, I note that the evidence otherwise is almost entirely hearsay which is not mutually corroborative and is to some extent mutually inconsistent.

Among the products stored in Respondent's warehouse are cartons of aluminum foil packets which each contain a single serving of ketchup. On occasion, some of the cartons are damaged and the packets fall to the floor, from which they are swept up and deposited in the trash. Also, Respondent follows the practice of making available to the employees in their breakroom ketchup packets from damaged cartons. Management never specifically told employees that the condiments thus made available in the breakroom were not to be removed from the premises. Heskett credibly testified that during his 19

[97] Laymon testified that half of them featured Terry Bradshaw. Werner credibly testified that this was true as to a fourth of them.

[98] Kowalski's and Carter's notes state 15, 20, or 25. Werner testified that Laymon referred to a 12-flag package.

[99] Nor did Laymon testify that he himself had ever obtained any flags. However, Kowalski's notes state that Laymon said he had taken a McDonald flag in August.

[100] As previously noted, I do not believe that Heskett made this admission.

months of employment with Respondent he removed from Respondent's premises for his own personal use and without express permission, either in his lunchbox or in his pocket, 10 to 15 unopened packets of ketchup which he had picked up from either the floor or the breakroom.

Laymon testified that on one summertime occasion whose date he was not asked to give (he and Heskett worked for Respondent between July 1979 and September 1980), Laymon saw Heskett leaving the premises at the end of his work shift with seven or eight cloth towels stuffed into his back pocket; and that those which were visible to Laymon appeared to be clean. Laymon testified that he did not know whether Heskett ever brought the towels back. He and Heskett both testified that Heskett frequently had towels, which he used as sweat rags, on his person or in his possession while he was working in the warehouse. Laymon further testified that during his September 10 interview with management about theft, he told Werner that Heskett had taken "thousands" of cloth towels—a statement which was untrue by Laymon's own admissions. Heskett credibly testified that he had taken 20 to 30 towels from the boxes which were made available to the employees between late spring 1979 and April 1980. He further credibly testified that at management's instructions he used these towels in the warehouse to clean up spills, and that he used them as sweat rags, would openly take them out of the warehouse to launder at home, and would openly bring them back to the warehouse. Still according to his credible testimony, he took towels from the box in the presence of then Supervisor Kimberly (who said nothing), was never advised of any restrictions on taking them home, and used some of them to wash his bathrooms. Also, he credibly testified that on two occasions he removed towels from the "recoup" area to use as sweat rags, on one of which occasions he took the towels home and the following week brought them back; and that on two occasions, he requested and received towels from the mechanics, which he used as sweat rags and left on the premises. At the unemployment compensation hearing, he testified that he had returned any towels which he had taken away.

Heskett testified that, with the permission of management, he removed from the premises three empty pickle containers, two empty boxes, and an empty container of "all purpose cleaner."[101] Further, he testified that from time to time, management had issued him a clipboard to use in the course of his work; that he and others had regularly followed the practice of taking home every day, and bringing in every morning, the clipboard currently in use; that he had received about five clipboards but had been requested to sign a receipt for only one; that he had never been asked to and never did return any of the clipboards issued to him; and that immediately after being discharged he requested and received permission from Supervisor Morrison to retrieve Heskett's clipboard and left the plant with it "under the direction of" Morrison and Supervisor Hougham.[102] Also, Heskett credibly testified without contradiction that in the summer of 1979, he had taken home orange juice with the permission of then Warehouse Manager Kimberly. Heskett testified that except for ketchup packets, towels, and the items described in this paragraph, he never took home any other items from the warehouse. I credit his testimony in this respect, and do not accept either Laymon's testimony that he would always see Heskett with "something" but could not remember a specific instance, or a somewhat similar report received by management from Spitler, an admitted drug user and an admitted and convicted thief, who did not testify.

Kowalski's notes state that during the September 10–11 interviews, employee C accused Heskett of having eaten "a lot of" cookies belonging to Respondent, and, perhaps, of eating other company products as well. With exceptions not relevant here, Heskett denied removing any company property from company premises. This testimony aside, he was not asked about eating company products. Employee C was admittedly a thief and drug user. I conclude that the evidence is insufficient to establish that Heskett in fact engaged in such conduct.

I conclude that the items which Heskett did remove from the premises were either items which would have been discarded anyway, items removed with management's express or implied consent, or items removed with what an honest employee could reasonably infer was management's implied consent. Thus, I find that Heskett is entitled to affirmative relief.

5. Klouser testified that on more than one occasion in early 1980, he saw *Burrell* put "fries," orange juice, and meat in his freezer suit, which is a very thick and bulky set of coveralls, and carry such merchandise to his car. Klouser advised Respondent in September 1980 (although he did not testify) that about March 1980 Burrell and employee J took a case of "1/4 meat" and Burrell "got up tight because [J] crossed him and didn't give him his share." Laymon testified that on an undisclosed number of occasions in the winter of 1979–80, he saw Burrell and employee D remove "some boxes" of meat and take them out the gate; and that when Laymon asked Burrell on the first such occasion what the meat was for, Burrell replied that it was for Klouser. Laymon further testified that on one occasion, whose date he did not specify, Laymon asked Burrell if he knew what the McDonald hamburger meat tasted like and whether the "blue meat" (quarter-pound hamburger patties) or the "red meat" (smaller patties) tasted better, to which Burrell replied that he had a box of "blue meat" at home and preferred it because the "red meat" "fried down so small"; Kowalski's notes attribute to Laymon the statement "Burrell said he took blue meat for self"; but

[101] Heskett testified that this container had been damaged and was leaking, that he and Klouser emptied it into the dumpster, and that Klouser gave him permission to take the container home. Klouser testified for Respondent, but was not asked about this matter. Contrary to Respondent, I do not infer the continued presence of all-purpose cleaner in the container from Heskett's testimony that he used the container to wash his dog, which had a bad flea problem. I think it unlikely that Heskett regarded all-purpose restaurant cleaner as fit for washing a dog, however flea-ridden.

[102] The clipboard in question was the fourth one issued, which Heskett regarded as more convenient for the job than the others. It bore his name, but this could readily have been removed. Leadman Burrell credibly testified that management never told him to return displaced clipboards or to tell his crew to do so.

Laymon testified that during the September 10 interview, he said nothing about these alleged remarks by Burrell, but merely said that he removed the meat for Klouser. Further, Laymon testified that on unspecified dates, he and Burrell had taken boxes of meat or "fries" from the freezer to Klouser's automobile. Also, Laymon testified that during the winter of 1979–80, Laymon saw Burrell remove eggs in his lunchbox on two occasions (testimony inconsistent with Laymon's September 10 representations to management, *supra*, fn. 56, that Burrell had removed dozens of eggs several times),[103] saw him remove cheese in his lunchbox on two occasions, and demonstrated to Klouser how eggs and cheese could be physically fitted into Burrell's lunchbox. In addition, Laymon testified that in late July, Burrell said that he had stopped taking things from the warehouse and advised Laymon to do the same.

As previously noted, Klouser and Laymon are both admitted thieves who knew at the time they testified that Respondent had power to cause their prosecution for theft. Respondent's conduct at the time they accused Burrell of theft shows that Respondent did not believe such allegations, and seized on them only after Burrell declined to leave the unit to accept a supervisory job. Laymon admittedly lied when he told management during the September 10–11 interview that Heskett had taken thousands of towels; and Kowalski's and Carter's notes show that Laymon was inaccurate in testimonially denying that he told management that he and Burrell put meat and "fries" in a trailer before moving them to Klouser's car. Burrell credibly testified that about February 1980, Klouser told him and two other employees that a damaged case of eggs was going to be dumped and that the employees could take some if they wanted to and should dump the rest; and that Burrell took about a dozen of such eggs home. He denied taking any eggs from Respondent's premises on any other occasion, denied ever taking any meat product, cheese, or other food product from Respondent's premises, and denied the remarks attributed to him by Klouser about J and by Laymon about the comparison of "blue meat" and "red meat" and about removing things from the warehouse. Except as to the egg incident as testified to by Burrell and the "fries" incident discussed in the next paragraph, for demeanor reasons I credit Burrell's denials of the testimony of Klouser and Laymon summarized in the preceding paragraph. Further, I credit Burrell's testimony that he never had a lunchbox. As to the egg incident, I perceive no even arguably disqualifying misconduct by Burrell.

Burrell credibly testified that on at least two occasions in about May 1980, at the direction of Supervisor Klouser (Burrell's and Laymon's immediate superior), these two employees, the only ones in the section on that shift, removed a damaged case of "fries" and put it in Klouser's car. The employees openly carried the cases out the front door, without concealing them in any manner,[104] but the employees were then working on the night shift, and the parking lot was not well lighted. If not then removed from the warehouse, these "fries" would eventually have been either "recouped" or sold to a restaurant at a discount. I conclude that this conduct does not disqualify Burrell from reinstatement. *Shell Oil Company (Successor to Shell Oil Company, Incorporated)*, 95 NLRB 102 (1951), enfd. in relevant part 196 F.2d 637 (5th Cir. 1952). In this connection, I note that Klouser was Burrell's (and Laymon's) immediate superior, that Klouser was not a personal friend of Burrell's (or, so far as the record shows, Laymon's), that both Burrell and Laymon had been hired in 1979, and (according to Klouser's uncontradicted and credible testimony) before Werner became center manager in January 1980, management personnel were allowed to have company product for personal use. Further, once it has been found that union activity was the real reason for an employee's discharge, the policy considerations pointing to requiring his reinstatement with backpay are very strong indeed.

> . . . [A]nti-union discrimination exercises a coercive effect not only upon the immediate victim, but upon all present or future employees of the particular employer; it impresses upon them the danger of their welfare and security associated with membership in or activity on behalf of a labor organization. Accordingly, the purpose of the order to offer reinstatement is not only to restore the victim of discrimination to the position from which he was unlawfully excluded, but also, and more significantly, to dissipate the deeply coercive effects upon other employees who may desire self-organization, but have been discouraged therefrom by the threat to them implicit in the discrimination. This essential reassurance can be afforded—freedom can be reestablished—only by a demonstration that the Act carries sufficient force to restore to work anyone who has been penalized for exercising rights which the Act guarantees and protects. . . . [*Ford Motor Company*, 31 NLRB 994, 1099–1100 (1941).]

Such considerations particularly militate against denying a reinstatement/backpay remedy to the unlawfully discharged employee for the very reasons which the employer falsely advanced for the discharge; the effect of such a denial on employees unaccustomed to such nice distinctions would likely be the same as dismissing the complaint as to his unlawful discharge.

Accordingly, Respondent will be required to offer all nine of the discriminatorily discharged employees immediate reinstatement to the jobs of which they were unlawfully deprived, or, if such jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed. In addition, Respondent will be required to make all nine employees whole for any loss of pay they may have suffered by reason of the discrimination against them, less

[103] Laymon testified that Burrell's lunchbox was of the usual black type whose lid is curved to accommodate a thermos bottle.

[104] Klouser testified that the employees wrapped these boxes in a freezer suit when carrying them out. For demeanor rensons, I accept Burrell's testimony that he took home a freezer suit to wash it, a permissible purpose.

net interim earnings, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as called for in *Florida Steel Corporation*, 231 NLRB 651 (1977).[105] Also, Respondent will be required to remove from the personnel folders of the discriminatees, and give to them, the documents which Respondent prepared to justify or memorialize the pretexts on which it relied to defend such discrimination.[106]

Further, I agree with the General Counsel that a bargaining order should issue here. As previously found, by October 6, 22 of Respondent's 36 unit employees had signed operative union cards. Also, as previously found, on October 6 Respondent began to engage in unfair labor practices which, at the very least, had "the tendency to undermine majority strength and impede the election process" (*N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 614 (1969)). A bargaining demand is not a precondition to a bargaining order as a remedy for such unfair labor practices. *Beasley Energy, d/b/a Peaker Run Coal Company, Ohio Division*, 228 NLRB 93 (1977). Whether such unfair labor practices call for a "second-category" bargaining order turns on whether "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Gissel, supra*, 395 U.S. at 614–615; *Multi-Medical Convalescent and Nursing Center of Towson* v. *N.L.R.B.*, 550 F.2d 974, 976 (4th Cir. 1977), cert. denied 434 U.S. 835 (1977); *N.L.R.B.* v. *Jerome T. Kane d/b/a Kane Bag Supply Co.*, 435 F.2d 1203, 1206–1207 (4th Cir. 1970). Among the factors material in making such an assessment are the extensiveness of the employer's unfair labor practices in terms of their past effect and residual impact on election conditions, and the likelihood of their recurrence in the future. *Gissel, supra*, 395 U.S. at 612, 614.

In the instant case, Respondent's unfair labor practices did not merely tend to, but did in fact, undermine the Union's majority status. With Lohman's October 9 discharge, almost a third of the card-signers had been unlawfully discharged, and the Union's October 6 status of 22 card-signers in a unit of 36 had been changed to 10 card-signers among 22 actively employed unit employees.[107] Moreover, the Board stated:

> The discharge of employees because of union activity is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work. [*Mid-East Consolidation Warehouse, A Division of Ethan Allen, Inc.*, 247 NLRB 552, 560 (1980); see also *United Dairy Farmers Cooperative Association*, 257 NLRB 772 (1981); *Atlanta Blue Print & Graphics Co.*, 244 NLRB 634, 638 (1979); *Entwistle, supra*, 120 F.2d at 536 (4th Cir. 1941).]

Several of the discharges effected here constituted a particularly persuasive way of discouraging the remaining employees from engaging in union activity, because the pretext selected by Respondent—namely, false charges of dishonesty—might well prejudice a victim's entire career. Further, Respondent discriminatorily discharged not only seven card-signers in the appropriate unit, but also a non-unit card-signer (Walton) who had participated in arranging for the October 4 union meeting and a ninth employee (Zoretic) who had not yet signed a card but had revealed awareness of the meeting while untruthfully disclaiming to management any knowledge about it. Thereafter, Respondent brought home to the discriminatees' replacements the message conveyed by their predecessors' unlawful discharge, by telling the replacements that a like fate awaited them if they too engaged in union activity. In addition, Respondent made clear to the employees (by coercive interrogation and by giving them the impression of surveillance) that Respondent intended to find out the identity of union adherents (knowledge most useful for discrimination), and indicated to one of the unlawfully discharged employees that Respondent would sympathetically consider grievances which employees brought to it rather than attempting to remedy through union organization.

I conclude that a cease-and-desist, reinstatement-backpay, and notice-posting order would be insufficient to permit a fair election within a reasonable time. In the first place, Respondent's unlawful discharge of a third of the card-signers (and more than a fifth of the bargaining unit), and its threat of like action with respect to the replacements, lead me to conclude that the damage to the employees' ability to exercise a free choice has already been done, even assuming that Respondent does not resume its unfair labor practices. Voluntary actions speak louder than words uttered under compulsion. I think it unlikely that the coercive impact of these unfair labor practices would be dissipated by a Board-composed notice posted under Board (and perhaps judicial) compulsion, or even by the return of the discriminatees should they choose to accept Board (and perhaps judicially) compelled reinstatement offers. In the second place, I am doubtful whether such an order would deter Respondent from continuing its unfair labor practices. The threat and most of the unlawful discharge decisions proceeded directly from Respondent's highest-ranking official at the Manassas warehouse, who at the time of the hearing still occupied that position; and his threat of discharge to replacements was made several days after Respondent received the initial charge herein, which complained of (*inter alia*) all the unlawful discharges except

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[105] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[106] The complaint does not allege any unlawful conduct directed against employees Shutlock and Huffer, who received written warnings with respect to the same alleged October 6 rack-damaging incident on which Cummings' third warning and his discharge were allegedly based. Accordingly, I doubt my authority to require removal of such warnings from the files of Shutlock and Huffer. However, in view of my findings that the damage to the rack did not occur on October 6, their warnings, too, should in fairness be excised. Compare *N.L.R.B.* v. *Ambrose Distributing Co.*, 358 F.2d 319, 321 (9th Cir. 1966), cert. denied 385 U.S. 838 (1966).

[107] However, between October 6 and 9, Respondent terminated or received resignations from seven unit employees, including five card-signers, who are not named in the complaint. If these seven terminations had not occurred, the discharges would have resulted in 15 card-signers in a unit of 29.

Walton's. Respondent's only conduct even arguably seeking to neutralize its unlawful conduct is its statement that it intends to offer Zoretic reinstatement with backpay on the ground that he was discharged in consequence of a mistake. In view of the foregoing, I find that Respondent's unfair labor practices call for a bargaining order. *Multi-Medical Convalescent and Nursing Center of Towson, supra*, 550 F.2d 974 (4th Cir. 1977), cert. denied 434 U.S. 835; *Maidsville Coal Co.*, 257 NLRB 1106 (1981); *Freehold AMC-Jeep Corporation*, 230 NLRB 903 (1977); *S. L. Industries, Inc. and Extruded Products, Corp.*, 252 NLRB 1058 (1980); *Florsheim Shoe Store Co.*, 227 NLRB 1153, 1163 (1977), enfd. in relevant part 565 F.2d 1240 (2d Cir. 1977).[108]

Respondent contends that a bargaining order is inappropriate here because of turnover within the unit. As of October 6, 1980, there were 36 employees in the appropriate unit, of whom 23 signed union cards between October 4 and 10. As of March 17, 1981, the time of the hearing, there were 32 undischarged employees whose jobs were in the unit description, of whom 16 (including 9 card-signers) had also been on the October 6, 1980, payroll. Plainly, Respondent is in no position to rely on the presence of 8 of the 16 new hires, since such new hires constituted replacements for 8 discriminatorily discharged card-signers. *Independent Sprinkler & Fire Protection Co.*, 220 NLRB 941, 960 (1975), enfd. 95 LRRM 2064 (5th Cir. 1977). In short, the 32 employees in the March 1981 unit included 24 of the October 6, 1980, employees, 17 card-signers, and 8 employees who had been discharged for union activity. Such circumstances fail to support any contention that the existing employee complement has not been exposed to any unfair labor practices and would be deprived for the effective period of a bargaining order of any voice in determining whether or not to be represented by a union.[109]

In any event, Board precedent calls for me to give little or no weight to such evidence of turnover. See, e.g., *Tartan Marine Company*, 247 NLRB 646, 648, fn. 8 (1980), enfd. as modified 644 F.2d 882 (4th Cir. 1981). To the extent that Board and court of appeals approaches may be irreconcilable, I am expected to follow the Board's views. *Ford Motor Co. (Chicago Stamping Plant)* v. *N.L.R.B.*, 571 F.2d 993, 996–997 (7th Cir. 1978), affd. 439 U.S. 891 (1979). Taking the turnover factor into account gives:

> . . . an added inducement to the employer to indulge in unfair labor practices in order to defeat the union in an election. He will have as an ally, in addition to the attrition of union support inevitably springing from delay in accomplishing results, the fact that turnover itself will help him, so that the longer he can hold out the better his chances of victory will be.

*N.L.R.B.* v. *L. B. Foster Company*, 418 F.2d 1, 5 (9th Cir. 1969), cert. denied 397 U.S. 990 (1970); see also *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 703–705 (1944). To be sure, employees (here, less than a third of the unit) who were hired after the Union obtained its majority will be compelled by a bargaining order to accept representation by a union which they could have had no voice in selecting or rejecting.[110] However, as the Supreme Court noted in *Gissel, supra*, 395 U.S. at 613:

> There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships. [*Franks Bros., supra*, at 705–706.]

For the foregoing reasons, a bargaining order will be issued here. Because the Union had achieved majority status on October 6, 1980, and Respondent's unfair labor practices began on that date, Respondent will be ordered to bargain as of that date. *Peaker Run, supra*, 228 NLRB 93.

In addition, Respondent will be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[111]

The Respondent, The Martin-Brower Company, Manassas, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

[108] If the distinction were material here, I would find this to be a "first-category" case for the issuance of a bargaining order under *Gissel*. Cf. *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), enfd. in part and remanded in part 633 F.2d 1054 (3th Cir. 1980), decision on remand, 257 NLRB 772 (1981).

[109] Cf. *Chromalloy Mining and Minerals Alaska Division, Chromalloy American Corporation* v. *N.L.R.B.*, 620 F.2d 1120, 1131–33 (5th Cir. 1980). It seems likely that replacements for the eight discriminatees constituted most or all of the employees who were hired after October 6 and attended the October 25 meeting where Werner threatened to discharge replacements who engaged in union activity.

[110] Of course, the same is true of employees hired after the unlawful execution of a recognition agreement or collective-bargaining agreement, the execution of a settlement agreement which includes an undertaking to withdraw recognition or to bargain, or the eligibility date of a Board-representation election. While the policy considerations underlying these classes of cases are not necessarily present here, such cases do show that *Gissel*-type bargaining orders do not present the only situations where employees are bound by representation decisions made before they were hired.

[111] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Threatening employees with discharge for union activity, giving employees the impression of surveillance over union activity, soliciting employees to take grievances to management rather than attempt to obtain redress through organizing a union, and interrogating employees regarding union activity in a manner constituting interference, restraint, or coercion.

(b) Discharging, demoting, or otherwise discriminating against any employee with regard to his hire or tenure of employment or any term or condition of employment, to discourage membership in Warehouse Employees, Local Union No. 730 of Washington, D.C. a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Robert Ivar Lohman, Ross Alexander Cummings, Paul Bryant Jolley, Jr., Gary William Burrell, William Leo Heskett, Philip Isaac Posey, Charles Franklin Payne, Kenneth Ray Walton, and (if Respondent has not already done so) Ernest Richard Zoretic reinstatement to the jobs of which they were unlawfully deprived, or, if such jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in that part of this Decision entitled "The Remedy."

(b) Remove the following documents from the files of the following employees, and deliver such documents to such employees:

(1) As to Lohman, the change-of-status form bearing the effective date of October 9, 1980; the employee disciplinary report dated October 9, 1980; and the employee disciplinary report dated October 7, 1980.

(2) As to Jolley, the change-of-status form (with attachments) with an effective date of October 7, 1980; the "contact memorandum" dated October 7, 1980; and the "employee disciplinary report" dated October 7, 1980.

(3) As to Cummings, the employee disciplinary report and the change-of-status form, both dated October 7, 1980.

(4) As to Heskett, the change-of-status form dated October 6, 1980, and the employee disciplinary report dated October 27, 1980.

(5) As to Walton, the change-of-status form and employee disciplinary report, both dated October 15, 1980.

(6) As to Burrell, the change-of-status form dated October 6, 1980, and the employee disciplinary report dated October 27, 1980.

(7) As to Posey, the employee disciplinary report dated October 27, 1980, and the change-of-status form dated October 8, 1980.

(8) As to Zoretic, the employee disciplinary report dated October 6, 1980.

(c) Preserve and, upon request, make available to the Board, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful for analyzing the amount of backpay due under the terms of this Order.

(d) Upon request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit, and embody in a signed agreement any agreement reached:

> All warehousemen and forklift operators employed by Respondent at its Manassas, Virginia, location, excluding all office clerical employees, truckdrivers, receiving clerks, shipping clerks, guards, and supervisors as defined in the Act.

(e) Post at its Manassas, Virginia, facility copies of the attached notice marked "Appendix."[112] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 5, in writing, within 20 days from date of this Order, what steps Respondent had taken to comply herewith.

IT IS FURTHER RECOMMENDED that paragraph 9 of the complaint in Cases 5-CA-12736 and 5-CA-12737, and paragraph 6 of the complaint in Case 5-CA-12694, are hereby dismissed.

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[112] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."